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PATRIATION OF THE CANADIAN CONSTITUTION: COMPARATIVE FEDERALISM IN A NEW CONTEXT

William C. Hodge*

INTRODUCTION

What races will survive World War III? The Chinese and the Québécois. The Chinese because there are so many of them, and the Québécois because if they've survived the last four hundred years, they'll survive anything. Québec is that part of North America that is so distinct from the rest, and against such odds, that it takes pride in serving to define what a nation is—and can be.

—JOEL GARREAU¹

The Canadian constitution, also known as the British North America Act, 1867,² has been “patriated.” Of that bundle of sticks that, fastened together, constitute sovereign autonomy, a significant few continued to rest with the British Parliament until 1982—a condition the Canadians found humiliating and the British embarrassing. With the passage of the Canada Act by the Parliament of the United Kingdom on March 29, 1982, and with royal approval, the Canadians became masters of their own house, having gained complete internal powers of constitutional amendment.³ But an

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1. J. GARREAU, *THE NINE NATIONS OF NORTH AMERICA* 365 (1981).

2. 30 & 31 Vict., ch. 3.

3. The label “Made in Britain” remains stamped on the Canadian constitution. The Constitution Act, 1982 is in force in Canada because the Commons, Lords, and Queen of the United Kingdom, in Parliament assembled, have so declared. The grundnorm (or ultimate legal principle, *see infra* note 90) of the Canadian constitution, in theory, continues to rest with the United Kingdom Parliament. The Canadians, unlike the Indians, Western Samoans, Pakistanis, and many other former peoples of the empire, do not have an autochthonous constitution. There is no constitutional reason why the United Kingdom Parliament could not declare the entire Dominion experiment a great mistake, repeal the Canada Act and all the British North America Acts, and provide for non-representative direct

equally important constitutional event was the process of patriation itself inasmuch as it demonstrated the continuing vitality of federalism in Canada.

The origins of the patriation process suggested its federal character. The separatist movement in Quebec fueled the engines of Canada's constitutional changes.⁴ The final spark which ignited the mixture was the "Sovereignty-Association" referendum placed before the people of Quebec on May 20, 1980.⁵ The Quebec petition for divorce posed the ultimate test of federalism in Canada. Although rejected, it shocked the Canadian family out of its traditional complacency, and stirred a nation-wide demand for constitutional change. Reacting against the separatist initiative of the *Parti Québécois*, the forces of "non" focused the referendum on constitutional change. They campaigned for their own mandate, a "no" vote that meant

prerogative colonial rule. But as Lord Sankey said, with respect to a similar hypothetical "matter of abstract law," "[T]hat is theory and has no relation to realities." *British Coal Corp. v. The King*, 1935 A.C. 500, 520.

A common formula employed by constitutional draftsmen is deliberate proclamation of the autochthonous grundnorm: France, 1958: "The French people hereby solemnly proclaims . . . ;" Germany, 1949: "The German People . . . have enacted . . . ;" India, 1960: "We, the people of India . . . do hereby adopt, enact, and give to ourselves this Constitution;" Indonesia, 1945: "[T]he Indonesian people hereby declare . . . ;" Japan, 1946: "We, the Japanese people . . . ;" Western Samoa, 1960: "[W]e the people of Western Samoa"

These constitutions are found in *CONSTITUTIONS OF THE COUNTRIES OF THE WORLD* (A. Blaustein & G. Flanz eds. 1985): vols. V (France), VI (Germany), VII (India), VII (Indonesia), VIII (Japan) and Supp. (Western Samoa).

4. In its modern form, Quebec nationalism enjoyed a meteoric rise after a breakaway group of francophones left the Quebec Liberal party in October of 1967 to form the *Mouvement Souveraineté-Association* (*M.S.A.*) on November 18 and 19, 1967. Joined by conservative (*Ralliement Nationale*) and radical (*Rassemblement Pour l'Indépendance Nationale*) francophone groups, the *M.S.A.* held its founding convention a year later, in October 1968, and became the *Parti Québécois*. The party, also known as the *Péquistes* or the *P.Q.*, was organized to seek power at the provincial level. The *Péquistes* took seven seats, and 23.1% of the vote in their initial campaign in 1970, became the official Opposition with 30.0% of the vote (but only six seats) in 1973, and were swept into power with 71 of the 110 seats, and 41.4% of the vote, in 1976. See J. SAYWELL, *THE RISE OF THE PARTI QUÉBÉCOIS, 1967-76* (1977); P. DESBARATS, *RENÉ* (1977).

A general review of the unique position occupied by Quebec in North America can be found in J. GARREAU, *THE NINE NATIONS OF NORTH AMERICA* 362-90 (1981).

5. The referendum was not framed in the crisp language of a proposed statute. The somewhat equivocal apologia sought a mandate in the following terms:

The government of Quebec has made public its proposal to negotiate a new agreement with the rest of Canada based on the equality of nations;

This agreement would enable Quebec to acquire the exclusive power to make its own laws, levy its taxes and establish relations abroad—in other words, sovereignty—and at the same time to maintain with Canada in economic association including a common currency;

No change in political status resulting from these negotiations will be effected without approval by the people through another referendum;

On these terms do you give the Government of Quebec the mandate to negotiate the proposed agreement between Quebec and Canada? Yes. No.

CANADIAN ANNUAL REVIEW OF POLITICS AND PUBLIC AFFAIRS 1980 44 (R. Byers ed. 1982).

“yes” to constitutional reform.⁶ Pierre Trudeau, Prime Minister of Canada, established this strategy in opening Parliament on April 14, 1980: “[M]y government . . . promises to interpret a vote of No to sovereignty-association as a vote for the rebuilding of the Canadian federation.”⁷ Leaders of the remaining nationwide political parties, and premiers of the nine other provinces adopted that theme, putting their differences aside for the duration of the successful campaign against separatism.⁸

The victory of the “no” side⁹ immediately led to a unanimous call by the three party leaders in the federal parliament for national reconciliation and an agenda for constitutional change. Prime Minister Trudeau, entering the chamber to a standing ovation, acknowledged his pre-referendum undertaking and stated that Canada could no longer ignore the desire expressed in the “Sovereignty-Association” Referendum for constitutional renewal within the federal framework.¹⁰ The leader of the Official Opposition

6. The enabling act which authorized the referendum provided for umbrella committees to contest the referendum campaign. The *Péquist*e leader and provincial premier, René Lévesque, became chairman of *Le Regroupement Nationale Pour le Oui*, and the provincial opposition leader, Claude Ryan of the Quebec Liberal Party, was Chairman of *Le Comité des Québécois Pour le Non*. The act required that all spending be channelled through these committees, with an upper limit of 50 cents per voter, or about \$2.1 million (Canadian) for each side. A major controversy arose when the federal government budgeted and spent some \$2 million on advertising which glorified the Dominion of Canada and the virtues of federalism. See Referendum Act, QUE. REV. STAT., ch. 6 (1978); see also CANADIAN ANNUAL REVIEW OF POLITICS AND PUBLIC AFFAIRS 1980, *supra* note 5, at 42–55.

7. 1 H.C. DEB. 1980, Sess. 5.

8. The sovereignty-association referendum spoke confusingly of “economic association” with Canada “based on the equality of nations.” A less equivocal essential statement of the *Péquist*e goal is announced by René Lévesque, *Péquist*e leader: “For our own good, we must dare to seize for ourselves complete liberty in Quebec, the right to all the essential components of independence, *i.e.*, the complete mastery of every last area of basic collective decision-making. This means that Quebec must become sovereign as soon as possible.” R. LÉVESQUE, AN OPTION FOR QUEBEC 27 (1968).

Legal analyses of the *Péquist*e platform are found in Mayer, *Legal Aspects of Secession*, 3 MAN. L.J. 61 (1968), Matas, *Can Quebec Separate?*, 21 MCGILL L.J. 387 (1975), and Greenwood, *The Legal Secession of Quebec—A Review Note*, 12 U.B.C. L.R. 71 (1978).

Greenwood briefly surveys the American experience with secession, compares the abortive attempt of Western Australia in 1935, and concludes that unilateral action by Quebec cannot effectuate legal secession. Mayer concludes that independence for Quebec can be achieved only by United Kingdom legislative enactment.

Compare the remarks of Mr. Chief Justice Chase in *Texas v. White*, 74 U.S. (7 Wall.) 700, 726 (1869), where the acts of secessionist Texas were declared to be “absolutely null . . . without operation in law” because the American federal union was “perpetual,” “indissoluble” and “indestructible.”

9. The results of the May 20th referendum were surprisingly clearcut. With an electoral turnout of over 85%, the “no” side claimed a victory of 59.56% (2,187,991 votes) to 40.44% (1,485,761 votes). CANADIAN ANNUAL REVIEW OF POLITICS AND PUBLIC AFFAIRS 1980, *supra* note 5, at 55; see also Maclean's, May 26, 1980, at 17–20.

10. Trudeau stated:

Madam Speaker, yesterday, in a provincial referendum, the people of Quebec opted overwhelmingly for the continuation of the Canadian experiment.

. . . .

. . . I would like to remind both winners and losers that democratic life does not proceed only

Progressive Conservative Party, Mr. Joe Clark, demanded that the Government act immediately to bring about constitutional change. He stated: "[W]e must make the best possible use of the climate of sincerity and goodwill that now exists throughout Canada, and see to it that our common objective, renewed Canadian federalism, is achieved"¹¹ The leader of Canada's New Democratic Party, Mr. Edward Broadbent, echoed the call to constitutional change within the federal system.¹² In response to

from the opinion of the majority but also from the expression and inclusion of the opinions of minorities The fact that we have lived 113 years in a democratic system in Canada allows me to assure the supporters of the other option that their deep aspirations will be met by political changes

The majority of Quebec voters have refused to give their provincial government the mandate to negotiate the withdrawal of Quebec from the Canadian federation . . . because they accepted the assurances from . . . the Liberal party of Quebec, . . . from the Leader of the Official Opposition, from the Leader of the New Democratic Party, . . . and from myself that changes were not only possible within confederation but that the rejection of the option advocated by the Party Québécois would take us out of the dead end and allow us at last to renew our political system.

. . . . Altogether, what Quebecers expressed yesterday was a massive support for change within the federal framework. We cannot venture to ignore this will to change which reflects that of all other areas in the country and to fall short of the expectations of Canadians. This is why, on May 14, I solemnly undertook to launch the constitutional renewal and never stop working at it until Canada finally has a new Constitution.

2 H.C. DEB. 1980, 32nd Parl., 1st Sess. 1261-63.

11. Clark stated:

[T]he main federal political parties . . . have . . . solemnly committed themselves to a renewed Canadian federalism. The same commitment was made by the provincial premiers who were unanimous in denouncing the status quo [W]e must make the best possible use of the climate of sincerity and good will that now exists throughout Canada, and see to it that our common objective, a renewed Canadian federalism, is achieved.

. . . . [T]he public of Canada are now interested in constitutional reform. There is a genuine feeling on the part of Canadians, in whatever province, territory or region of this country, that it is time to bring our constitution up to date with the realities of a modern country.

. . . . Hopefully yesterday's referendum in Quebec will provide very real impetus to the process of change and renewal. But the desire—indeed it is more than a desire—the demand for change is not simply a matter of that referendum and indeed not simply a matter of that province. It is a desire shared by all of the provinces and virtually all of the people of Canada. That fact must be reflected in the agenda for change which this government now has a responsibility to place before the country.

Id. at 1265.

12. Broadbent stated:

[W]e must recognize, however, that this is not a vote for the status quo. Our federal system of course is not without fault [A]ll parties [have] recognized that there was an urgent need for constitutional changes. All party leaders in the House pointed that out this afternoon All Canadians, wherever they are, must respond positively to that major historical event [the referendum] and the federal government must act and be perceived, not only by the Quebec people, but also by all the other Canadians, as a government out to promote the fulfillment of the people in all areas of Canada.

. . . . It is not simply the case that the need for constitutional change is now urgent. I would also

these calls for constitutional change, a First Ministers Conference was convened in Ottawa on June 9, 1980, and a well-prepared constitutional package was laid before the Canadian Commons four months later, on October 6, 1980.

The stakes involved in the Quebec petition for divorce were high, for failure to act might well have meant national disintegration. The result was that the Canadian people enjoyed—and ultimately wearied of—an unprecedented exposure to and participation in constitutional consciousness. The sound and fury rising from Quebec made Canadians realize that, as a people, they preferred to hang together—and that the entity known constitutionally as “British North America” should become Canada. But furthermore, Canadians resolved that if constitutional power was—at last—to be shipped across the Atlantic from London to the Dominion Government, and if Quebec Province was to be dealt some of that power, then all the other provinces should share in that power. In other words, to the extent that the Federal Canadian Government offered a special deal to Quebec to keep it in the Dominion, that special deal had to be made with the other provinces as well.

Provincial leaders and federal ministers did struggle through fourteen months of negotiation on a charter of rights, shared control of natural resources, recognition of native peoples as domestic dependent nations and a domestic amendment formula to sever the archaic colonial ties to the United Kingdom Parliament.¹³ Success resulted with the concurrence of nine of ten provinces and passage of the constitutional package by the Canadian Commons on December 2, 1981.¹⁴ After passage through the United Kingdom Parliament, the new Canada Act became the Constitution of Canada on April 17, 1982.

This article will first create a context for examining the federal implications of the patriation process by surveying the history of federalism in Canada. The article will then review the legally significant stages in the patriation struggle, noting in particular the surprising role played on center stage by the provinces. The article concludes that, despite the intent of Canada’s founders, the views of modern theorists, and the centripetal

like to stress that the means are at hand for achieving this change soon.

Id. at 1267.

13. The federal-provincial negotiation and the federal plan to take unilateral action is described in D. MILNE, *THE NEW CANADIAN CONSTITUTION* chs. 1–5, at 21–164 (1982).

14. Although this preface has purported to credit Quebec with the activation of constitutional reform, that province has continued to oppose the new constitution. The Attorney-General of Quebec unsuccessfully argued before the Court of Appeal of Quebec that the federal Parliament had no power to request and consent to constitutional change without the agreement of the Province of Quebec. That court ruled, virtually on the eve of the Royal Proclamation, that Quebec had no such veto power. *In re Attorney-General of Quebec and Attorney-General of Canada*, 134 D.L.R.3d 719 (1982).

economic forces of the modern nation-state, recent events signify a continuing thrust toward provincial rights.

I. INTRODUCTION TO CANADIAN FEDERALISM

Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their desire to be federally united into one Dominion

—Preamble, British North America Act, 1867

A. *A Theoretical Perspective on Federalism in Canada*

Federating polities predate the Christian era by more than a thousand years. Such a fact speaks highly of the pragmatic utility of an institution which could serve equally well semi-nomadic tribes of shepherds, seafaring city-states, and the twentieth-century global village.¹⁵ Today, in spite of all the unifying forces of the latter twentieth century—satellite communications, air travel, common markets, welfare expectations, multinational economic enterprise, and electronic data storage, retrieval and use—federalism, far from becoming outmoded, has entered a new era of intellectual respectability. Although modern theorists have often pronounced federalism in Canada, as elsewhere, outdated, several theoretical reasons support the view that federalism is very much alive.¹⁶

The predecessors to modern federal theorists were the greatest constitutional teachers of the latter nineteenth century, Lord Bryce and Professor A.V. Dicey. Both surveyed North American federalism and reached opposite conclusions. Each, however, made significant errors. Lord Bryce

15. The Old Testament is a textbook of federal problems. The federated "amphictyony" of the twelve tribes of Israel are discussed in the book of Judges, being the two centuries before the period of Saul and David described in 1 and 2 *Kings*. See J. BRIGHT, A HISTORY OF ISRAEL 42 (1959).

The classic study of Mediterranean federal systems is E. FREEMAN, HISTORY OF FEDERAL GOVERNMENT IN GREECE AND ITALY (2d ed. 1893); see also J. LARSEN, GREEK FEDERAL STATES (1968).

16. The most abrupt, even brutal obituary to Canadian federalism was penned by Lord Durham in his *Report on the Affairs of British North America*, the most famous single document in the history of the Commonwealth. 2 LORD DURHAM'S REPORT ON THE AFFAIRS OF BRITISH NORTH AMERICA (C. Lucas ed. 1912). Sent out from Great Britain to survey and advise on the disturbances of 1837, Lord Durham wrote that, upon arrival as High Commissioner in 1838, he was "strongly inclined to the project of a federal union." *Id.* at 304. Upon reporting back to Her Majesty, however, he reversed himself completely and rejected that solution, concluding that only the "vigorous rule of an English majority," *id.* at 307, and "obliterating the nationality of the French Canadians," *id.* at 299, could restore tranquility to Canada.

He further buttressed his argument by pointing to the American state of Louisiana, where "the French language and manners bid fair, in no long time, to follow their laws and pass away like the Dutch peculiarities of New York." *Id.* at 303.

Durham was spectacularly wrong, and the peculiarities of the Québécois have not passed away.

anticipated what might be called the post-World War II view, forecasting the evolution of federalism into centralism, while Dicey foresaw no unitary tendencies at all.

Bryce discussed the changes in communications, commerce and finance, and the bridging effect of the occupation of the intermediate spaces in the American West, and found it “impossible to ignore the growing strength of the centripetal and unifying forces [T]he importance of the States will decline as the majesty and authority of the National government increase.”¹⁷

Dicey, on the other hand, foresaw no trend toward the center. Excepting the events of the Civil War, he found the American government a “slumbering” sovereign which would never rouse. His triply critical observations are familiar: “Federal government means weak government Federalism tends to produce conservatism Federalism, lastly, means legalism”¹⁸ His annotation of the latter criticism has a particularly modern ring: noting “the predominance of the judiciary [and] the prevalence of a spirit of legality among the people,” he concluded that “[f]ederalism substitutes litigation for legislation.”¹⁹

Modern scholarship has built on the insight of Bryce, perhaps excessively so. The extreme may be those politician-scholars, like Professor H.J. Laski and former Australian Prime Minister Gough Whitlam, whose ideological bent was such that federal niceties only frustrated them in their impetuous drive to get on with twentieth-century solutions to twentieth-century problems. Laski’s article, *The Obsolescence of Federalism*,

17. 2 J. BRYCE, *THE AMERICAN COMMONWEALTH* 694–95 (1889).

Lord Bryce stumbled uncharacteristically when he predicted federal legislation addressing the “practical inconveniences” of divergent state marriage and divorce laws and a constitutional solution regarding liquor prohibition. The failed experiment of the Eighteenth Amendment left liquor regulation, with marriage and divorce, among the most jealously guarded state prerogatives. *Id.* at 694.

18. A. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 171, 173, 175 (9th ed. 1939).

He described the impotent central government in expressive terms:

Under a federal as under a unitarian system there exists a sovereign power, but the sovereign in a federal state is a despot hard to rouse. He is not, like the English Parliament, an ever-wakeful legislator, but a monarch who slumbers and sleeps. The sovereign of the United States has been roused to serious action but once during the course of more than a century. It needed the thunder of the Civil War to break his repose, and it may be doubted whether anything short of impending revolution will ever again rouse him to activity.

Id. at 149.

If the great Depression can be called “impending revolution,” then Dicey might be correct. But even before Roosevelt’s New Deal, and during Dicey’s lifetime (1835–1922), the slumbering giant had awakened, and began a pursuit of national control of the economy. Anti-trust acts were passed in 1890 and 1914, a federal income tax amendment was adopted in 1913, the Federal Trade Commission was created by statute in 1911, and the Federal Bureau of Investigation was created administratively in 1908. It must be concluded that Dicey miscalculated federal capacities.

19. *Id.* at 175, 179.

appeared in 1939 and asserted that "the epoch of federalism is over."²⁰ Although focusing on the United States, he wrote of the difficulties encountered by the federal systems of Germany, Australia, and Canada.²¹ Laski's fact-finding was astute, if typical of the Anglo-American left of that day; his advocacy was eloquent and bears repeating: "[W]orld historical causes [have] made federalism everywhere in the world today a handicap and not a help to governmental progress." "Giant-industry" and "giant capitalism," he argued, had outgrown the capacity or willingness of the state governments to control.²²

Laski's thesis may have been obvious at the turn of the century and before. But even as he wrote, the positivism he sought was already administering (or partnering) the commanding heights of the private sector; Roosevelt's agencies were already overseeing chunks of private sector turf. His declaration of federal obsolescence was hyperbole, however, because the states continued, without much concern for federal control of the interstate economy, to retain legal responsibility for criminal law, family law, wills and trusts, torts, contracts, limited liability incorporation and property law.

Still more shrill were the comments, in September 1971, of Australian opposition Labour Party leader, Gough Whitlam, whose ideological purity bore scant regard for nineteenth-century checks and balances.²³ Concern for states' rights he termed "constitutional constipation"; indeed, "[t]he whole phoney war over States' rights serves to protect private affluence and to promote public squalor."²⁴ His party had long advocated Australian legislative union, with the states seen as obsolete relics of nineteenth-century colonialism, to be re-created as municipal authorities. The party platform advocated "National planning of the economic, social and cultural developments of the Commonwealth" and "Amendment of the Commonwealth Constitution to clothe the Commonwealth Parliament with unlimited powers" States were to be created by the Commonwealth Parliament, and were to possess only delegated powers.²⁵

20. Laski, *The Obsolescence of Federalism*, 39 NEW REPUBLIC 367 (1939).

21. *Id.* at 367.

22. *Id.* at 367, 369.

23. Whitlam, *A New Federalism*, 43 AUSTL. Q. 6 (1971). Gough Whitlam was leader of the Australian Labour Party (in opposition), from 1967 to 1972 and Prime Minister of Australia from December 1972 to November 1975.

24. *Id.* at 7.

25. AUSTRALIAN LABOUR PARTY, AUSTRALIAN LABOUR PARTY PLATFORM, CONSTITUTION, AND RULES 1917-1972, at 1 (1972), *quoted in* Whitlam, *supra* note 23, at 6. In June of 1972, that plank was replaced by the following formula: "Amendment of the Commonwealth Constitution to clothe the Parliament of Australia with such plenary powers as are necessary and desirable to achieve international co-operation, national planning, and the Party's economic and social objectives." *See* Whitlam, *supra* note 23, at 6; *see also* Commonwealth of Australia v. Tasmania, 57 AUSTL. L.R. 450 (1983) (great

While Laski emphasized that the private sector could only be controlled at the national level, Whitlam emphasized that public services and welfare could only be paid for at the national level. Whitlam pointed out the decreasing ability of local and state governments in Australia to finance capital improvements and provide social services. Australian state and local governments finance their works programs from loan funds, thus doubling or tripling the cost. The Commonwealth, more economically, finances its works programs with tax revenue. Whitlam's remedy was to inject federal revenues directly into local and semi-governmental authorities, bypassing the states.²⁶

Less ideology and more scholarship is found in Professor Wheare's classic text, *Federal Government*, first published in 1946.²⁷ Wheare recognized that central governments were being increasingly expected to control the private sector while underwriting an expanding public sector. Federalism, he suggested, may be a transitional phenomenon, useful in promoting progressively larger polities, but which is ultimately discarded as an unnecessary encumbrance.²⁸

Writing at the time when increased attention was being given to expanding central governments, Professor Wheare listed the accumulating centripetal factors as war, economic depression, demands for extended social services, and technological change.²⁹ He also posited as axiomatic the notion that "all general governments grow stronger in times of war and

augmentation of Commonwealth law-making powers and corresponding diminution of state authority because environmental legislation, otherwise ultra vires the Commonwealth, was validated by exercise of the Commonwealth Foreign Affairs power.); G. SAWER, *FEDERATION UNDER STRAIN* 2 (1977) ("[F]rom 1918 until 1971 [the national platform of the Australian Labour Party] contained a plank requiring the vesting of unlimited powers in the Commonwealth Parliament . . .").

26. Whitlam, *supra* note 23, at 17. Opposition to Whitlam's policies, while he occupied treasury benches, was fierce. Whitlam's version of federalism, said conservative Queensland Premier Bjelke Petersen, would lead to "a system of government involving fear and the midnight doorknock," *The Australian*, May 12, 1973.

The story of Whitlam's downfall, at the hands of a conservative-controlled states' rights-minded Senate, is told in P. KELLY, *THE UNMAKING OF GOUGH* (1976), L. OAKES, *CRASH THROUGH OR CRASH: THE UNMAKING OF A PRIME MINISTER* (1976), and in *LABOUR AND THE CONSTITUTION 1972-75* (G. Evans ed. 1977).

Perhaps the most singularly federal problem which beset the Whitlam regime in its final days was the so-called "Loans Affair"—a proposal by Prime Minister Whitlam's Executive Council on December 13, 1974 to borrow overseas some \$4 billion (U.S.) for development of Australian energy resources, without seeking state consent. The proposal was, *prima facie*, a violation of the Financial Agreement of 1927, an arrangement akin to a treaty between the several states and Canberra. Incorporated in a Commonwealth statute (Financial Agreement Act, 1944, II AUSTRAL. C. ACTS 1901-50, at 1856-91), that agreement requires a measure of state support (at least two out of six) before the Commonwealth can borrow money. See Davis, *A Unique Federal Institution*, 2 ANN. L. REV. 350 (1953); see also *infra* note 73.

27. K. WHEARE, *FEDERAL GOVERNMENT* (4th ed. 1963).

28. *Id.* at 238, 253.

29. *Id.* at 254.

economic depression" and the reverse corollary that "Peace and Prosperity are in truth prerequisites for the successful working of federal government."³⁰ Even arguing this, Wheare remains a Liberal, holding that diversity is worth preserving, that unity for the sake of unity is no virtue, and that federalism can provide variety and independence where unity and uniformity are not essential.

Only a few years ago, most Canadian writers, especially the social democratic reformers, quite happily described the centripetal trends they perceived in their Dominion. Professor Brady, writing in 1940, saw pluralism being whittled away as "socio-economic forces of modern industrialism tend to quicken the pace from federation to legislative union."³¹ Professor Corry, writing in 1958, saw changes in transportation, communication, and collection of data and argued that national collectivism would replace local individualism.³² Professor McWhinney, in 1965, saw an inevitable pendulum-like swing back toward the centralism of the original blueprint of the founding fathers.³³

The epitaph for federalism may have been penned by Laski in 1939 and annotated by social democrats since then, but it is premature to contract for the tombstone. In the U.S., for example, despite the increases in national control of the economy under the Commerce Clause,³⁴ federalism is not

30. *Id.* at 239. Professor Wheare's maxims are not indicia of federal systems, exclusive of all others. War and economic depression are a pernicious environment for any parliamentary system.

31. Brady, *Report of the Royal Commission on Dominion-Provincial Relations*, 21 CAN. HIST. REV. 245, 247 (1940). Professor Brady reiterated this vision as recently as 1959:

Since 1939 profound changes in Canadian society and ways of thought have involved a heavier subsidization of the provinces In all this the French Canadians as the chief defenders of traditional federalism face a difficult dilemma. Either they must patiently resign themselves to a course of events that threatens to erode the older federalism, or pursue more resolutely than hitherto the policy of survival by withdrawal. Some fear that they have no choice, and that the decision is made for them by the speed and inexorable strides of an industrialism which . . . assimilates them in character to English-speaking Canadians.

Brady, *Quebec and Canadian Federalism*, 25 CAN. J. ECON. AND POL. SCI. 259, 262, 263 (1959). Brady concludes that the industrialization of Quebec has produced an urban working class tied to Ottawa's welfare state, thus bridging the culture gap. *Id.*

32. Corry, *Constitutional Trends and Federalism* in CANADIAN FEDERALISM: MYTH OR REALITY 51, 52 (J. Meekison ed. 1968).

33. McWhinney, *Federalism, Constitutionalism, and Legal Change: Legal Implications of the "Revolution" in Quebec*, in THE FUTURE OF CANADIAN FEDERALISM 159 (P. Crepeau & C. Macpherson eds. 1965).

34. U.S. CONST. art. 1, § 8, cl. 3. Compare the commerce clauses of Australia and Canada. The power referred to the Dominion in the British North America Act § 91(2) is "The Regulation of Trade and Commerce," while the Commonwealth authority is § 51(1) of the constitution of Australia, power to make laws with respect to "trade and commerce with other countries among the States." See B. LASKIN, CANADIAN CONSTITUTIONAL LAW 295 (4th ed. 1975); R. LUMB & K. RYAN, THE CONSTITUTION OF AUSTRALIA 79 (2d ed. 1977). A useful comparative treatment is Stone, *A Government of Laws and Yet of Men, being a Survey of Half a Century of the Australian Commerce Power*, 25 N.Y.U. L. REV. 451 (1950).

Subsistence farms and backroad diners are sucked into the American federal commerce power in

dead. State legislatures and supreme courts continue to preside over most torts and contracts, most commercial sales and credit, marriage and divorce, guardianship and family law, personal property, real property and tenancy, motor vehicles, most crime, registration and licensing of professional practitioners, wills, trusts, and estates, and restraints on gambling, liquor and prostitution. An itemization of provincial powers in Canada would be similar, without marriage and divorce and substantive criminal law, but with greater provincial capacity to regulate trade and commerce and to provide a criminal procedure.³⁵ To paraphrase Professor Bora Laskin, the Dominion government may well have acceded to the concerns of the macroeconomist, while the provinces reign supreme in the realm of the sociologist.³⁶

Indeed, the discipline of sociology provides perhaps the most convincing reason to believe that federalism will persist. Several recent federal analysts have drawn significantly from sociology. A basic theme of this approach is its hostility toward legal analysis: "Legal answers are of value only in the solution of legal problems. And federalism is concerned with many other problems than those of a legal nature."³⁷ A framework for pursuing those other problems has been designed by W.S. Livingston:

Above and beyond this legalism [of Dicey and Wheare] there is an aspect of federalism that has been largely ignored. The essential nature of federalism is to be sought for, not in the shadings of legal and constitutional terminology, but in the forces—economic, social, political, cultural—that have made the

Wickard v. Filburn, 317 U.S. 111 (1942) and Katzenbach v. McClung, 379 U.S. 294 (1964). A temporary brake was applied to the Congressional use of the Commerce Clause in *National League of Cities v. Usery*, 426 U.S. 833 (1976) (federal wage and hour standards cannot be imposed on the states as employers "in the areas of traditional governmental functions"). The brake was apparently released, however, when that case was overruled in *Garcia v. San Antonio Metro. Transit Auth.*, 53 U.S.L.W. 4135, 4136 (U.S. Feb. 19, 1985) (Nos. 82-1913 & 82-1951).

35. Restraint of trade (antitrust) and labor-management relations are not pursued in Canada under the Dominions's "trade and commerce" clause; restrictive trade practices are treated as criminal matters, under the Dominion's criminal law power (British North America Act 1867, § 91(27)). Dominion industrial relations legislation is confined to those industries specifically designated as a Dominion concern: British North America Act 1867, § 92(10). Aspects of industrial conflict come under the Dominion's criminal law jurisdiction. See Scott, *Federal Jurisdiction Over Labour Relations—A New Look*, 6 MCGILL L.J. 153 (1960).

The textual discussion of the vitality of American state legal regimes is derived from conversations with Associate Justice Hans Linde of the Oregon Supreme Court, a leading proponent of state constitutional advocacy. See, e.g., Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970); see also Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). It is suggested that state supervision of criminal procedural rights, by interpretation of state constitutional provisions, will be increasingly common.

36. LASKIN, *supra* note 34, at 107.

37. Note, *A Note on the Nature of Federalism*, 67 POL. SCI. Q. 81, 85 (1952). This Note, reprinted in CANADIAN FEDERALISM: MYTH OR REALITY 20 (J. Meekison ed. 1968) became the first chapter of W. LIVINGSTON, *FEDERALISM AND CONSTITUTIONAL CHANGE* (1956).

outward forms of federalism necessary. Federalism, like most institutional forms, is a solution of, or an attempt to solve a certain kind of problem of political organization. It is true, on the whole, that federal governments and federal constitutions never grow simply and purely by accident. They arise in response to a definite set of stimuli; a federal system is consciously adopted as a means of solving the problems represented by these stimuli.³⁸

Several criticisms can be made of the sociological "method." First, a lawyer may demur and say "So what?" It is a truism that federalism incorporates diverse forces and interests. Second, every lawyer who litigates in a federal system must calculate changes in the stimuli that brought the federal bargain into being. Eighteenth-century economic stimuli, which called into existence the express words of the Commerce Clause in the U.S. Constitution, have nothing in common with the vectors of the post-industrial corporate state. Third, the task is too great; pursuit of such themes—that is, every human activity—spans the whole range of human knowledge. No discipline can recognize, let alone master, such a limitless catalogue. One suspects that what the sociologist is really saying is that it matters little what federal bargain the founders of any given federation seal, if it is not congruent with the unities and diversities of the society thereby governed, or the unities and diversities which arise in the future.

An example will serve to illustrate that sociology rather than legal theory may be a better gauge of the vitality of federalism in Canada. Take sport as a variable on the federal graph. The observation of Lord Durham, regarding leisure time activities in the two Canadas, distinguishing those of the French and British, that "the sports of childhood . . . are distinct and totally different," may have more significance than the express and enumerated powers in sections 91 and 92 of the British North America Act.³⁹ Perhaps the lesson is that a nation that doesn't play together will never enjoy legislative union.

Contrast the Australians, who, twenty years *before* federation, assembled a national cricket team, and journeyed by sea to England to play and win a "test" match.⁴⁰ Indeed, the concept of a national "test" team,

38. W. LIVINGSTON, *supra* note 37, at 22.

A federal system may not be the only possible response to a given set of stimuli. Local interests may be represented in a unitary national legislature, if the participating "national" legislators are local representatives. See Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

39. 2 LORD DURHAM'S REPORT ON THE AFFAIRS OF BRITISH NORTH AMERICA, *supra* note 16, at 39.

40. See Mandle, *Cricket and Australian Nationalism in the Nineteenth Century*, 59 J. ROYAL AUST. HIST. SOC'Y 225 (1973); see also John Masefield's *Eighty-five to Win, or England's Second Innings against the Australian Eleven at Kennington Oval on Tuesday, 29 August 1882*, in J. MASEFIELD, *THE BLUEBELLS AND OTHER VERSE* 73 (1961). Throughout this glorification of antipodean sport, Masefield always identifies the local players by their county of origin—Barlow, "the Red Rose County's Glory";

selected to play the best of other nations, is typical of Australia, New Zealand, and South Africa—but not Canada or the United States—and may have contributed to the unity of those three states. Excepting only world wars, it might be said that New Zealand is never so united as when its rugby team takes the field against Wales; and Australia never so united as when its cricketers are bowling against the West Indies.⁴¹ The national sports of Canada and the United States, on the other hand, ice hockey and baseball, as well as their respective codes of football, are unknown in the rest of the English speaking world, and culminate their season with internal cups, bowls and series. The American professional teams, in particular, are extensions of city-regional pride: Steel(makers) from Pittsburgh, Cowboys from Dallas, (Meat)Packers from Wisconsin, Pistons from Detroit, New York Yankees, the Jazz from New Orleans, New England Patriots, Forty-Niners from San Francisco, and so on. These most popular of North American sports reach a domestic climax without sending a national team abroad; on the other hand, in the world's most popular sporting event, the World Cup, New Zealand and three British teams were finalists in 1982, but neither the Canadian nor the American "national team" was in contention.

It might be argued, then, that international sporting consciousness presages a centripetal or collapsing federalism, but internal sporting rivalries, as the apotheosis of local consciousness, guarantee survival of strong regional identity. Returning to the Canadian case at point, if a sociologist, or a constitutional lawyer—or even a day-tripping tourist from the United States—can recognize that Quebec *is* different, then we could guess that a

Read, "Surrey's pride"; Peate, "Yorkshire's bowler"; and Studd, "Cambridge Studd"—but the colonial boys, from six separate colonies, each with its own constitution, were always referred to as Australians, and not by their colony of origin:

And then the conflict quieted to grim.

For master-spirits shine when hopes are dim;

Australia's best, all their best, were there.

Light, wicket, and themselves, all bade beware.

The field were all lithe leopards on the pounce:

Each ball had a new break at every bounce.

Id. at 76.

41. Contrariwise, it might be said that Australia and New Zealand are never so divided, but not along federal lines, as when their rugby teams play the national team from South Africa. Indeed, no local event in New Zealand's history—no anti-war movement, no industrial strike, no depression—has so destroyed the customary composure of New Zealanders as the 1981 South African Springbok rugby tour of New Zealand. Neither the United States nor Canada could have become so aroused, as their national identity is not at stake in international team sports.

Compare the litigation arising out of the South African team's American appearances: *Selfridge v. Carey*, 522 F. Supp. 693 (N.D.N.Y. 1981), *injunction upheld*, 660 F.2d 516 (2d. Cir. 1981). Governor Carey of New York, anticipating "wide spread violence" and "imminent danger of riot and breach of peace," attempted to ban the Springbok matches. 522 F. Supp. at 694. His information was based on "newspaper accounts of protests lodged against the Springbok tour in New Zealand" *Id.* at 696. The ban was enjoined on First and Fourteenth Amendment grounds.

lively form of federalism is afoot in Canada.⁴² When nineteenth-century British North America, therefore, became twentieth-century Canada, with the patriation of the Canadian constitution, the identity of the provinces was not submerged in the glory of a greater Canada, but rather provincial consciousness and powers were highlighted and underscored.

B. *The Experience of Federalism in Canada*

Analysis of the Canadian federal experience has been as varied as the arc of landscape that country describes. As an introduction to the intent of the founders, and to the turnabout in fact of that intent, it may be useful to survey two explanations, or models, of Canadian federal variety. The first is a simple pendulum model, measuring only the aggregate of Dominion and provincial powers, which would start with the weight positioned on the Dominion side, apparently frozen there.⁴³ But loosened by decisions of the Judicial Committee of the Privy Council, and kicked into motion by the discovery of a residue of power in the provincial repository of legislative capacity, the pendulum swung away from the Dominion.⁴⁴ This model

42. Even the casual tourist, with broken high school French, might be alerted by the legend on Quebec license plates, recently changed from the innocent "La belle Province," to the portentous "Je me souviens."

Compare litigation arising out of the equally ominous "Live Free or Die" license plate legend in New Hampshire: *Wooley v. Maynard*, 430 U.S. 705 (1977); *State v. Hoskin*, 112 N.H. 332, 295 A.2d 454 (1972). Until 1970, New Hampshire's non-commercial plates bore the words "Scenic New Hampshire." The Supreme Court found the new motto ideologically loaded and an unconstitutional violation of motorists' First Amendment rights.

Would an English-speaking Quebec motorist receive similar judicial relief under § 2 of the new Canadian "Charter of Rights and Freedoms," which refers to freedom of conscience, thought, belief, opinion, and expression? *See infra* note 110.

43. *See infra* notes 58 and 68.

44. Note especially the words of Lord Watson in the *Local Prohibition* case, Attorney-General for Ontario v. Attorney-General for Canada, 1896 A.C. 348, 360-61:

[T]he exercise of legislative power by the Parliament of Canada, in regard to all matters not enumerated in § 91, ought to be strictly confined to such matters as are unquestionably of Canadian interest and importance, and ought not to trench upon provincial legislation with respect to any of the classes of subjects enumerated in § 92. To attach any other construction to the general power . . . would . . . practically destroy the autonomy of the provinces. If it were once conceded that the Parliament of Canada has authority to make laws applicable to the whole Dominion, in relation to matters which in each province are substantially of local or private interest [enumerated head 16 of § 92], upon the assumption that these matters also concern the peace, order, and good government of the Dominion, there is hardly a subject enumerated in § 92 upon which it might not legislate, to the exclusion of the provincial legislatures.

See also *Hodge v. Queen*, 9 App. Cas. 117, 132 (1883).

In an earlier decision the Privy Council had foreclosed an open-ended approach to the Dominion Trade and Commerce clause, saying that Dominion authority "to legislate for the regulation of trade and commerce does not comprehend the power to regulate by legislation the contract of a particular business or trade" *Citizens Insurance Co. of Canada v. Parsons*, 7 App. Cas. 96, 113 (1881).

would see the final corrective input, world wars and depression, pushing the pendulum back to its Dominion starting point and away from "local and private" matters.

A more complex model, incorporating other variables and measuring other dimensions, would be a five-stage model, beginning with the centripetal forces of the legislative union envisaged by the founders. This stage, which might be termed neo-colonial or pseudo-federal, employed executive devices rather than legislative division of power to ensure centrist control and Eastern commercial domination of the Western provinces.⁴⁵ All the provinces were equal, but Manitoba and British Columbia were less equal than the others.

The second stage, overlapping somewhat the first stage, was the classical federalism determined by decisions of the Privy Council, wherein provincial powers listed in section 92 achieved legal parity with the Dominion powers listed in section 91.⁴⁶

A third stage, of central pre-eminence, was achieved by the discovery of "emergency powers," perceived by the Privy Council as latently reposing in the Dominion Government, and available in times of war and national emergency.⁴⁷ By its very nature, this stage is more a state of judicial mind, and less a sharply defined chronological period.

A fourth stage, characterized more by political flexibility than legal analysis, can be called co-operative federalism: institutional adjustments, political accommodation, tax sharing, joint Dominion-Provincial standing

45. Under § 90 of the Constitution Act, 1982, the Dominion Governor has the power of reservation, the power to withhold assent to reserved bills, and the power to disallow acts already passed.

46. See *supra* note 44.

47. Lord Haldane found emergency powers "implied in the constitution," if necessary to deal with, for example, "sudden danger to social order arising from the outbreak of a great war." *Fort Francis Pulp & Power Co. v. Manitoba Free Press Co.*, 1923 A.C. 695, 703; see also *In re Board of Commerce Act 1919*, 1922 A.C. 191, 197.

Compare the wartime decisions of *Duncan v. Cammell, Laird & Co.*, 1942 A.C. 624 (non-reviewable crown privilege to resist discovery of documents) and *Liversidge v. Anderson*, 1942 A.C. 206 (subjective standard of "reasonable cause"), sometimes referred to as the House of Lords' contribution to the war effort.

Compare also the New Zealand decision of *Stevenson v. Reid*, 1942 N.Z.L.R. 1, 2, where Justice Callan said that criticism of public authorities is:

one of the liberties which may have to be curtailed in war time if it is exercised in a manner which conflicts with a true view of the public good . . . [because] . . . our leaders have said that in this fight to preserve liberty we must be prepared . . . to surrender temporarily many of our liberties
. . . .

An analogous approach can be found in the contemporaneous decisions of the United States Supreme Court. *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944).

The Canadian doctrine of Dominion emergency power was recently re-examined in *Reference re Anti-Inflation Act*, 68 D.L.R.3d 452 (1976). Chief Justice Laskin saw the emergency power as a species of the genus "peace, order and good government." *Id.* at 484.

and ad hoc committees, delegation of power by the Dominion legislature to provincial agencies and delegation of power by provincial legislatures to Dominion agencies, and conditioned federal spending on local affairs.⁴⁸

A fifth stage might be called the sociologist's federalism, emphasizing as it does the linguistic, religious, cultural, and ethnic differences between Quebec and the rest of Canada. The dynamics of this stage suggest that whatever the legal order, and whatever the federal quarrels between Ottawa and one of the nine English-speaking provinces, the only significant line of power demarcation is between the separate (or separatist) interests of Quebec, on the one hand, and the common interests of the rest of Canada on the other.

None of these five stages is chronologically exclusive of the others, and indeed, a snapshot of the Canadian government at any moment may reveal features of most or all of the stages simultaneously. Therein may lie the secret of success and political/constitutional operations in modern Canada: the lawyer's mastery of classical federalism, the economist's perception of neo-colonial federalism, the politician's handling of emergency and co-operative federalism, and a Frenchman's understanding of two-culture federalism.

If federalism is alive in Canada, it represents a reversal of the founders' expectations and intentions because the founders sought to establish a strong central government in Canada. However, this reversal of original intent comports with the principle of federal constitutional analysis that once in operation, federal constitutions always reverse the central or provincial bias of their respective founders. A corollary of that rough rule is that the founders in question always assessed a prior existing constitution, and incorrectly understood its balance of powers, its federal organization and its potential federal capacities. This section will first examine what the intent of Canada's founders was, noting their reaction against the prior existing constitution of the United States. Then it will suggest that the original central bias of the founders has been reversed in the Canadian experience.

48. The non-constitutional machinery of Dominion-Provincial relations is described in *CANADIAN FEDERALISM: MYTH OR REALITY* pt. 5 (J. Meekison ed. 1968). Professor Smiley has described three major devices or formulae of political adjustment between Ottawa and the provinces: (1) coordination through committees made up of provincial and dominion cabinet members; (2) legislative delegation of power to executive agencies; (3) federal spending on provincial objects. Smiley, *The Rowell-Sirois Report, Provincial Autonomy, and Post-War Canadian Federalism*, 28 *CAN. J. ECON. & POL. SCI.* 54, 60 (1962). An example of the depth and extent of coverage is the committee cited by Smiley: the Dominion-Provincial Coordinating Agency on Diseases of the Beaver. *Id.* at 60. "Cooperative federalism" is expressed and defined in *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 289 (1981) ("[It] allows the states, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs.").

C. A Centralist Intent

It is historically true that the founders of federal constitutions have always assessed and incorrectly understood a prior existing constitution. This is illustrated by the example of the United States. The Americans, taking their understanding of the British constitution from Montesquieu's out-of-date, and inaccurate, *Spirit of the Laws*, concocted a triply-divided central government, with an indirectly elected surrogate king, or chief magistrate, not understanding that the executive in Great Britain had already been captured by the legislature through the convention of Cabinet and Prime Minister.⁴⁹

The Canadians, assessing the American system in 1864–65, were understandably distressed at what they saw as federal-state tensions run amuck. To avoid that paroxysm of state's rights, they deliberately and expressly oriented their constitution around the center, following the New Zealand model of executive control of provincial legislative capacity.⁵⁰ (In turn, the

49. MONTESQUIEU, *THE SPIRIT OF THE LAWS* (T. Nugent trans. 1949).

Montesquieu studied English institutions firsthand from 1729 to 1731, during the age of Walpole. Montesquieu was in turn studied by law students and patriots in the Atlantic colonies and the new republic. See M. CURTI, *THE GROWTH OF AMERICAN THOUGHT* 123 (1943); P. SPURLIN, *MONTESQUIEU IN AMERICA 1769–1801* (1940). Sam Adams, the Carrolls, John Marshall, Jefferson, James Madison and others absorbed Montesquieu's notions of the strength of British institutions.

As recorded in *The Spirit of the Laws*, those notions were adulatory: "One nation there is also in the world that has for the direct end of its constitution political liberty. We shall presently examine the principles on which this liberty is founded; if they are sound, liberty will appear in its highest perfection." (Montesquieu later hints that while the laws of England may be perfect, corrupt practices may mar the consummation.) MONTESQUIEU, *supra*, at 151.

Montesquieu posited the now familiar "three sorts of power," being the legislature, the executive in acts of state, and the executive in civil law or the judiciary:

When the legislative and executive powers are united in the same person, . . . there can be no liberty . . . lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner . . .

The executive power ought to be in the hands of a monarch, because this branch of government, having need of despatch, is better administered by one than by many . . .

But if there were no monarch, and the executive power should be committed to a certain number of persons selected from the legislative body, there would be an end then of liberty; by reason the two powers would be united, as the same persons would sometimes possess . . . a share in both.

Id. at 151, 156.

The traditional explanation—Walpole assumed the role of Minister in the Chair, becoming the first Prime Minister, because George I, who spoke no English, could not preside—need not be swallowed whole to grasp the success of the cabinet in eclipsing arbitrary prerogative. Certainly by the time of William Pitt, British Prime Minister while the states were convening in Philadelphia in 1787, that "efficient secret of the English Constitution, . . . the close union, the nearly complete fusion of the executive and legislative powers" was a thing accomplished. See W. BAGEHOT, *THE ENGLISH CONSTITUTION* ch. 1, at 1–29 (1963) (1st ed. London 1867). And Montesquieu and the young Americans missed it.

Perhaps the most articulate and influential iteration of Montesquieu's mistakes is found in *THE FEDERALIST* No. 47 (J. Madison 1788).

50. Governor Sir George Grey of New Zealand claimed in 1874 (while advocating retention of New Zealand's provincial system) that his country's constitution of 1852 had set the federal example for

authors of the Australian confederation, a generation later, perceived Canada as a barely concealed legislative union and reacted against it by protecting the legislative rights of their six states.)

Ironically, as the British perfected the cabinet system, the United States was left with a copy of British institutions as they were before the victory of Parliament, the Americans never having fully understood the atrophy of royal prerogative. In turn, the New Zealand federal system was dismantled completely in 1875, American federalism coalesced around the center (at least in economic affairs), Canadian centralism melted into provincialism, while Australian states' rights collapsed into monism. The best laid plans of constitution-makers usually find federal antithesis.

The debates of the Canadian founders at the Quebec Conference in 1864 illustrate both their awareness of federal experiments elsewhere and their struggle to locate express and residual powers.⁵¹ John A. Macdonald, Conservative leader in Upper Canada, and Prime Minister of the Dominion for most of its first quarter-century, set the tone at Quebec, in opening the substantive debate.

Referring to "the adjoining Republic," he noted that:

The primary error at the formation of their constitution was that each state reserved to itself all sovereign rights, save the small portion delegated. We must reverse this process by strengthening the General Government and conferring on the Provincial bodies only such powers as may be required for local purposes.⁵²

The great fear put forward by Macdonald which necessitated a strong union was not only the lesson to be learned from the American experience, but

Canada. See O. RUTHERFORD, *SIR GEORGE GREY: A STUDY IN COLONIAL GOVERNMENT* 590 (1961). Extensive comparisons of the federal systems of Canada and New Zealand can be found in W. MORRELL, *THE PROVINCIAL SYSTEM OF GOVERNMENT IN NEW ZEALAND, 1852-76* (2d ed. 1964).

In turn, the Australian founders, a generation later, perceived Canada as a barely concealed legislative union and reacted against it by protecting the legislative rights of their six states.

The Australians, for their part, were in no doubt about the nature of the Canadian compact (just as the Canadians themselves were, in their ultimately incorrect vision of the American arrangement). The Australian founders saw the British North America Act as "the semi-federal Constitution of the Dominion of Canada," found it excessively centralist, and adopted the American model of granting express powers to the Commonwealth, leaving the residue with the pre-existing states, to "continue as at the establishment of the Commonwealth." J. QUICK & R. GARRAN, *THE ANNOTATED CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH* vii (1901). The Australian formula referred to is found in §§ 106 and 107 of the Australian Constitution, which preserve state Constitutions and state Parliaments, respectively.

51. See generally *CONFEDERATION: BEING A SERIES OF HITHERTO UNPUBLISHED DOCUMENTS BEARING ON THE BRITISH NORTH AMERICA ACT* (J. Pope ed. 1895). Those documents, principally the minutes of the Quebec Conference as taken by Lt. Col. Hewitt Bernard, Secretary of the Conference, have been usefully reprinted, with supplementary material in G. BROWNE, *DOCUMENTS ON THE CONFEDERATION OF BRITISH NORTH AMERICA* (1969). Citations to debates at that conference will be to the Bernard minutes in the Browne edition.

52. G. BROWNE, *supra* note 51, at 94.

also the possibility of military attack by a potentially warlike United States. Macdonald believed that only a strongly united Canada would guarantee protection from foreign attack.⁵³

The Macdonald theme was picked up and rejected by Chandler of New Brunswick, who argued, "We are here to form a constitution for Federal Government [not legislative union.] Let the Provinces otherwise remain as they are, so far as possible." Chandler (unsuccessfully) pleaded the Provincial case, arguing that Macdonald's proposals would take away provincial powers and turn the provinces into "merely large municipal corporations."⁵⁴

Another advocate of strong central powers, Charles Tupper of Nova Scotia, demurred to the fears of Chandler, stating that Macdonald's plan was best. Tupper argued that "it was desirable to have a plan contrary to that adopted by the United States."⁵⁵ Others echoed Tupper, stating that the American system, reserving all powers in the states not granted to the national government, was a failure. Others joined in to agree on the American failure. As Macdonald said:

Mr. Chandler would give sovereign power to the Local Legislatures, just where the United States failed It would ruin us in the eyes of the civilized world [if we imitated the United States]. All writers point out the errors of the United States. All the failings prognosticated by De Tocqueville are shown to be fulfilled.⁵⁶

The convention then turned on devices to check ultra vires acts by provincial legislatures, with McCully of Nova Scotia praising the New Zealand executive control of provincial acts. This was to be preferred, McCully said, to the American practice of referring conflicts of jurisdiction to the courts, which would "set them over the General Legislature."⁵⁷

In the end, the Canadians followed neither the New Zealand pattern of enumerating the powers denied to the provinces nor the American expression of powers granted to the central government, but settled on the rational

53. *Id.* at 95–96. Macdonald also gratuitously criticized the presidential system:

A great evil in the United States is that the President is a despot for four years Under the British Constitution, with the people having always the power in their own hands and with the responsibility of a Ministry to Parliament, we are free from such despotism. These weaknesses in the United States Constitution have not only attracted our attention, but also that of Confederate States, who endeavor to avoid them [T]hey allow Ministers to appear on the floor of the House to defend their measures.

Id. at 97.

54. *Id.* at 114, 122.

55. *Id.* at 122.

56. *Id.* at 124; *see also* exchanges of Haviland, Colonel Grey, Tupper, Browne, and McCully with Chandler, *id.* at 122–24.

57. *Id.* at 123–24.

if novel device of setting out separate charters of Dominion and provincial powers in the British North America Act, sections 91 and 92 respectively.⁵⁸ While on its face inherently logical, this solution suffered from latent defects: 1) the reserved or residual powers were only vaguely and awkwardly preserved in section 91; 2) the broad concepts employed in each section made overlap and conflict inevitable; and 3) there was no clear supremacy clause.⁵⁹

The constitutional craftsmanship of the British North America Act exhibits the Canadian founders' primary objective of creating a strong and unified national government. The following is a brief outline of Canada's constitutional organization.

(1) *The Executive Branch*: The Canadian Governor General bears an unnecessarily prolix title, as all the provincial governors are lieutenants of that official, both in style and in appointment. By sections 58 and 59, the ten lieutenant governors are appointed by the Governor General, presumably upon the advice of the Dominion Prime Minister.⁶⁰ They can be removed for cause assigned by the Governor General, but not by an impeachment process of the provincial legislature concerned.⁶¹

The Canadian Governor General exercises his assent to Dominion legislation subject to reservation and the Queen's disallowance power.⁶² The

58. The double-barreled distribution of legislative power is the distinguishing characteristic of the Canadian federation. Both the United States and Australian constitutions expressly listed the powers granted to the new central government in each case, expressly leaving the states with residual common law and statutory power. See U.S. CONST. art. I, § 8 (congressional powers); U.S. CONST. amend. X (reservation of powers to the states); AUSTL. CONST. § 51 (Commonwealth parliamentary powers). §§ 106, 107, 109 ("saving" of state Constitutions, state Parliaments, and state Laws).

The Canadian constitution, known as the British North America Act until 1982, listed 31 Dominion powers in § 91, and 16 specific, enumerated, exclusive, provincial powers in § 92. Unforeseen was the judicial nurture and expansion of particular areas of provincial law-making (enumerated heads) as repositories of constitutionally preferred power. Cf. *infra* note 67.

Under § 1 of "An Act for the Union of Canada, Nova Scotia, and New Brunswick, and the Government thereof; and for Purposes connected therewith," that long title was to be cited as the British North America Act, 1867, 30 & 31 Vict., ch. 3. By § 53(2) of the Canada Act (passed by the United Kingdom parliament on March 29, 1982), the British North America Act of 1867 is renamed the Constitution Act, 1867: "Section 1 is repealed and the following is substituted therefor: '1. This Act may be cited as the Constitution Act, 1867.'" Eighteen other statutes entitled "British North America Act" are similarly renamed, with appropriate dates. With all due respect to Canadian sensitivity, but to avoid confusion, this article will continue to refer to §§ 91 and 92 of the British North America Act, 1867.

59. It must be emphasized, however, that Dominion legislative supremacy need not have been so clearly defined, as the Dominion leadership could employ the executive machinery of disallowance to shortstop provincial ambition.

60. The British North America Act, 1867, § 58, provides: "For each Province there shall be an Officer, styled the Lieutenant Governor, appointed by the Governor General in Council by Instrument under the Great Seal of Canada."

61. British North America Act, 1867, 30 & 31 Vict., ch. 3, § 59.

62. Section 55 of the British North America Act, 1867 defines the Governor General's legislative role:

Where a Bill passed by the Houses of the Parliament is presented to the Governor General for the

Dominion Governor stands in the place of the Queen, with respect to the reservation and disallowance powers, over provincial law-making.⁶³ With respect to provincial legislative capacity, it is important to note this Dominion executive capacity to suppress conflict between the Dominion and the provinces. The Dominion Governor General is empowered to appoint provincial judges, from the highest appellate level to district and county judges, excepting only, for historical reasons, the probate judges in Nova Scotia and New Brunswick.⁶⁴ Dominion employment is further secured through provision of judicial salaries, allowances, and pensions by the Canadian Parliament.⁶⁵

(2) *The Legislative Branch*: The Canadian Senate was never a true repository of sectional, provincial interest—the effervescence of federalism was capped in the upper house by gubernatorial appointment of the Senators individually and one Senator as Speaker.⁶⁶ Thus, the Canadian Senate, controlled gubernatorially, became reflective of national party ideals, not regional concerns.

The cardinal aspect of any federal system remains the mode of apportioning legislative responsibility between the whole and the parts: the enumeration of powers, the unenumerated residue, if any, the location of that residue, and, in case of conflict, which is to be paramount. The Canadian formula is opaque; indeed, most Canadian constitutional textbooks are little more than recitals of sections 91 and 92 of the British North America Act. The problem that has arisen is the fact that the forty-five heads of legislative subject matter, which are partitioned into Dominion and provincial compartments, lack a clear disposition of which body is

Queen's Assent, he shall declare, according to his Discretion, but subject to the Provisions of this Act and to Her Majesty's Instructions, either that he assents thereto in the Queen's Name, or that he withholds the Queen's Assent, or that he reserves the Bill for the Signification of the Queen's Pleasure.

British North America Act, 1867, 30 & 31 Vict., ch. 3, § 55.

Section 56 provides that the Queen may disallow, within two years, any bill assented to by the Governor General.

Section 57 provides for the coming into force of a reserved bill upon the receipt of the assent to the Queen.

63. British North America Act, 1867, 30 & 31 Vict., ch. 3, § 90.

64. British North America Act, 1867, 30 & 31 Vict., ch. 3, § 96.

65. British North America Act, 1867, 30 & 31 Vict., ch. 3, § 100.

66. Section 24 of the British North America Act, 1867 provides, in part: "The Governor General shall from Time to Time, in the Queen's Name, . . . summon qualified Persons to the Senate" Section 34 provides in part: "The Governor General may from Time to Time . . . appoint a Senator to be Speaker of the Senate, and may remove him and appoint another in his Stead."

Compare also the failure of the upper house in New Zealand to represent provincial interests, as described in W. MORRELL, *THE PROVINCIAL SYSTEM OF GOVERNMENT IN NEW ZEALAND, 1852-76*, at 63-64 (2d ed. 1964). The New Zealand Legislative Council was abolished in 1950. An energetic upper house draws its strength from a viable federal system, and vice versa. The abolition of one will cause the atrophy of the other.

supreme and in which body the residue powers exist—a signal failure, given the broad language employed in the competing lists.⁶⁷

The language of sections 91 and 92 imply Dominion supremacy—the clear intent of the founders. The residual powers seem to be left with the Dominion in section 91, which gives peace, order and good government power to the Dominion except for those express powers granted to the provinces in section 92. Left at that, the formula would be simple reversal of the American model (express powers granted to the center, the residue left with the states).

Ironically, “for greater Certainty,” the drafters set out an illustrative inventory of the matters which might be of especial concern to the Dominion.⁶⁸ This inventory is not a separate grant of power—it is only a declaration of “matters” to which Dominion authority “*extends*” exclusively, the power having been previously granted. In pursuit of “greater Certainty,” but with the result of even greater obfuscation, this inventory clause concludes with the declaration that any subject matter found in the Dominion’s illustrative list shall “not be deemed to come within the Class of Matters of a local or private Nature” assigned to the provinces. Coterminous legislative capacity exists, nevertheless, because of the loose language used in the competing catalogues: the Dominion power to regulate “Trade and Commerce” in section 91(2) obviously clashes with the express Provincial powers to make laws in relation to “Property and Civil Rights” and “all Matters of a merely local or private Nature” in section 92(13) and (16).

67. The British North America Act, 1867 created 29 enumerated heads of Dominion power in § 91, and 16 similar clauses regarding the provinces in § 92. Additional clauses were added to the Dominion list in 1940 and 1949, making a total of 31, but the constitutional amendment powers §§ 91(1) and 92(1) were consequentially removed by § 53 of the Constitution Act, 1982. The total of 45 enumerated heads is now made up of 30, under § 91, and 15 under § 92. *See supra* note 58.

Perhaps the most singular aspect of the Canadian Constitution is that parallel list of constitutionally protected Dominion and Provincial powers. To employ a botanical metaphor, both the American and Australian central powers, the express lists, were solitary trees planted in an open meadow, that meadow being occupied by easily occulted, low-lying shrubbery of state common law. The constitutional tree grew and spread its branches, o’ershadowing the meadow, by economic necessity and judicial contrivance. The Canadian Dominion tree, however, was not a solitary plant—it was joined by a Provincial tree, its trunk of similar constitutional origins and dimensions. That Dominion tree has at various levels and in several branches been judicially pruned and its growth stunted by the side-by-side development and competitive organic success of the sturdy limbs of that Provincial tree.

68. The introductory paragraph of § 91 provides:

It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say,

In summary, then, appellate courts perceived reservation or residue clauses in each of the two parallel grants of power, one in section 91 (powers allocated to the Dominion), and another in section 92 (powers allocated to the Provinces). On one hand, the draftsman's clear favorite, the "Peace, Order and good Government of Canada" clause of section 91, was enhanced by the closing words of section 91, which deemed any matter coming within the section 91 enumerated list as not to come within the "local and private" class of section 92(16). (It should be remembered that the "Peace, Order and good Government" formula was commonly used by colonial draftsmen to signal plenary powers, and is found in the constituent documents of Australia,⁶⁹ New Zealand,⁷⁰ South Africa⁷¹ and many others. So far as is known, no court in any British jurisdiction has ever found a statute *ultra vires* on the ground that it was not for "Peace, Order and good Government.")

On the other hand, the "Peace, Order and good Government" clause was limited by the following phrase, "in relation to all Matters not coming within the Classes" enumerated in section 92. It was therefore possible, with the support of the judiciary, and enabled by a sparing use of the royal disallowance power, which reposed with the Dominion government, for the legislative residue, or legislative reserve power to seep from the Dominion grant in section 91, to the "local and private" class in section 92(16).

D. A Modern Reversal of the Founders' Intent

A rough rule of thumb in treating federal constitutions is to assume that once in operation, they always reverse the central or provincial bias of their respective founders. This principle is illustrated in both the Canadian and Australian experiences. The Australian experience is offered here as a contrast to that of Canada.

The years following the foundation of Canada's and Australia's constitutional systems respectively saw them each move in directions opposite from what their founders envisioned.⁷² Perhaps the opposing trajectories of

69. Commonwealth of Australia Constitution Act, 1900, 63 & 64 Vict., ch. 12.

70. New Zealand Act, 1852, 15 & 16 Vict., ch. 72.

71. South Africa Act, 1909, 9 Edw. 7, ch. 9.

72. A full survey of reasons for the evolution of Canada's and Australia's constitutional systems is beyond the scope of this article—and concern—but the following lists of factors, although not exclusive, are significant:

(1) Subsidence of the United States as a military threat to Canada, and, thanks to geography, the absence of any external force compelling unity;

(2) Contrariwise, the geographical isolation of Australia (and New Zealand) in the South Pacific, with the teeming millions of Asia, as perceived by the Australians, poised to flood the continent: thus the "White Australia" immigration policy, as well as the South Pacific eagerness to fight in British

Australian and Canadian federalism are best captured by reference to the careers and prose of two recent leaders of the respective states: the ideological centralizer, E. Gough Whitlam, one-time barrister and Prime Minister of Australia from 1972 to 1975; and the pragmatic federalist Pierre E. Trudeau, lawyer, law professor, and Prime Minister of Canada from 1968 to 1979 and from 1980 to 1984.

Whitlam's "New Federalism" has already been discussed with his reference to the "constitutional constipation" of state's rights; it may be more revealing to note that Whitlam's highly publicized departure from office was accented by the criminal charges brought against him.⁷³ The offense, as alleged, was essentially a crime against federalism and the regulation of debt in a federal system. The charges, laid as a private information by a Sydney solicitor, were brought against the former Prime Minister and three of his ministers on November 20, 1975, nine days after the Governor-General, Sir John Kerr dismissed the Whitlam Government.

Trudeau presents the image of a statesman who has, apparently, steered a successful course between a separatist Scylla and centralizing Charybdis, the *Parti Québécois* of René Levesque on one hand and the nationalizing, centralizing traditions of Trudeau's own party heritage on the other. Responding to the Québécois, Trudeau presented a devastating case against an independent Quebec, emphasizing economics, technology, and the dynamics of the North American and world economies.⁷⁴ Perhaps the most

wars;

(3) the Canadian colonial experience spanned nearly three centuries; the Australian colonies, relatively speaking, were settled simultaneously;

(4) Canada remained a mosaic; Australia, the melting pot, with but few, if any, undifferentiated lumps to homogenize;

(5) the Canadian constitution was the work of a sociopolitical elite in a pre-democratic era; the Australian confederation was a more popular act, with wide participation guaranteed, in 1900, by adult male suffrage, the female vote (at least in South Australia), and the secret ballot. *See* *FEDERALISM IN CANADA AND AUSTRALIA: THE EARLY YEARS* (B. Hodgins, D. Wright, & W. Heick eds. 1978) (especially B. Hodgins, *The Plans of Mice and Men*, *id.* at 3, 7-8);

(6) Canadian political organization was, and is, more regional, with provincial political parties, like Social Credit, having few or no national pretensions. Australian parties, in particular the Labour party, had a federal platform from the beginning which championed national organization and nationwide reform; and

(7) Australian colonies, each with a coastal capital and a rural outback, incorporated a division of labor—workers and landowners—with an easily perceived national identity and interest.

73. Whitlam purportedly conspired to borrow some \$4,000 million (U.S.) overseas, on the credit of the Commonwealth, to finance the development of energy sources over a twenty-year period, without seeking authority from the Australian Loan Council, a body created by the Financial Agreement Act of 1944, and consisting of representatives from each of the six states and the Commonwealth. *See supra* note 26. Whitlam may have intended to justify the oversight by characterizing the loan as "short-term." The intended source was reputed to be oil-rich Iraq, but the loan was never taken up. *See generally* Hodge, *Sankey's Case Against Whitlam: Crown Privilege*, 1979 N.Z.L.J. 58.

74. P. TRUDEAU, *FEDERALISM AND THE FRENCH CANADIANS* 9-25 (1968) (originally published as *LE FÉDÉRALISME ET LA SOCIÉTÉ CANADIENNE FRANÇAISE* (1968)).

conclusive point is the fate of the English-speaking people in Quebec and the French-speaking people in the other nine provinces should “Fortress Quebec” turn inward, as if besieged.⁷⁵

At the other extreme, Trudeau answers his radical, socialist colleagues by demonstrating that a progressive social democracy may be more easily pursued in a federal society than in a unitary one.⁷⁶ There is no inherent reason, in terms of the Provincial powers granted in section 92 of the British North America Act, why provincial governments should be poverty stricken, reactionary and unwilling to pursue social justice by legislative means: “Indeed the experience of that superb strategist Mao Tse-tung might lead us to conclude that in a vast and heterogeneous country, the possibility of establishing socialist strongholds in certain regions is the very best thing.”⁷⁷ He concludes that since regions and regional consciousness do and will continue to exist, political idealists should accept federalism as a constant, and pursue substantive goals, opportunistically, through the Dominion or one or more provinces.

Prime Minister Trudeau’s own pragmatic political tactics are functional, as demonstrated by Professor Trudeau’s admiration for the founders:

I am inclined to believe that the authors of the Canadian federation arrived at as wise a compromise and drew up as sensible a constitution as any group of men anywhere could have done. Reading that document today, one is struck by its absence of principles, ideas, or other frills⁷⁸

75. *Id.* at 29–30:

If Quebec defines itself constitutionally as the “national state of French Canadians” on the grounds that it contains the majority of French-speaking Canadians, the same logic—the logic of numbers—would lead all the other provinces, and indeed the federal state itself, to define themselves (at least pragmatically) as the national states of English-speaking Canadians. French Canadians would then have gained nothing and have lost a great deal

76. *Id.* at 125. In *The Practice and Theory of Federalism*, Trudeau presents three theses: 1) “[O]ther things being equal, radicalism can more easily be introduced in a federal society than in a unitary one”; 2) “the dynamics of history are not urging the Canadian nation towards centralization any more than they are towards decentralization and”; 3) “the theory of democratic socialism can make no unassailable case for centralization.”

77. *Id.* at 126.

78. P. Trudeau, *Federalism, Nationalism and Reason*, in *THE FUTURE OF CANADIAN FEDERALISM*, *supra* note 33, at 16, 29. This essay was presented to the 1964 joint meeting of the Association of Canadian Law Teachers and the Canadian Political Science Association by Pierre E. Trudeau, then Professor of Law at the University of Montreal. One of the frills implicitly condemned by Professor Trudeau in this 1964 conference paper might be an American-style charter of rights. An editorial footnote records that:

After presenting his paper as now published, [Professor Trudeau] sketched informally a functional approach to Canadian politics, and suggested that a federal Canada would be seen (on balance of costs and benefits) to be preferable to either separation or annexation, but that a workable federal Canada would require a new constitutional bill of rights guaranteeing economic security and cultural equality as well as individual liberties.

Id. at 37 n.1.

A commentator, Professor J. Corry, added that the purpose of the proposed bill of rights, which

Trudeau's admiration for utility (as opposed to "frills" or principles) is a predicate for a politician's capacity to compromise. Indeed, the hallmark of the Canadian achievement is compromise.⁷⁹

II. AMENDING THE CANADIAN CONSTITUTION

A. Introduction

The ultimate focal point for the legal and political provincial-dominion tensions of the patriation process became the Canadian Supreme Court, and the Dominion Reference case decided there in late 1981.⁸⁰ In that case, the Court addressed the question of whether the Dominion government could seek British amendments to the British North America Act without the request and consent of ten Canadian provinces. The package of amendments included not only a Charter of Rights that would bind all eleven Canadian legislatures but also a formula for internal or domestic amendment of the British North America Act—the so-called "patriation" of the Constitution. The Court delivered a two-part ruling, holding 1) that there was no legal constitutional prohibition against the federal government seeking fundamental change to the Constitution of Canada, as reposing in the British North America Act, without first obtaining the agreement of the provinces, but 2) that it would be a violation of constitutional custom and practice, as it had evolved in Canada for 115 years, for the federal government to seek such change without a sufficient measure of provincial agreement.

This article will review that Canadian Supreme Court decision,⁸¹ especially the Court's unique examination of the provincial contention that constitutional convention⁸² can crystallize.⁸³ The central theme is the claim

would be binding on all governments in Canada, was, according to its proponent, "to enable every Canadian to feel that he is an equal member of the nation." *Id.* at 37.

79. *Id.* at 27:

It is now becoming obvious that federalism has all along been a product of reason in politics. It was born of a decision by pragmatic politicians to face facts as they are, particularly the fact of the heterogeneity of the world's population. It is an attempt to find a rational compromise between the divergent interest-groups which history has thrown together; but it is a compromise based on the will of the people.

80. Reference re Amendment of the Constitution of Canada, 125 D.L.R.3d 1 (1981).

81. See *infra* text accompanying notes 145–69.

82. The notion of convention, quite alien to the U.S. constitutional concern, is bread and butter to operators in an unwritten (British-style) constitution. A convention is a rule which compels obedience by constitutional actors, although there is no legal sanction against non-obedience. For example, the Queen is obliged, by convention, to sign Bills which have been passed in the proper manner and form by the Houses of Parliament.

83. "Crystallization" is a now-discredited theory which holds that a convention can ripen into law, such that a court would give a remedy for non-obedience.

that the federal government must seek a measure of provincial approval before repatriating to London with request and consent. Introductory paragraphs will examine, briefly, the structure of the British North America Act, 1867, the powerful—and surprising—statement of provincial rights in the *Authority of Parliament in Relation to the Upper House* reference case,⁸⁴ Prime Minister Trudeau's Charter of Rights and patriation plan, the preliminary examination of a committee of the British Commons (the Kershaw Report),⁸⁵ and decisions of three provincial high courts on the same question.⁸⁶ It will be concluded that the *Senate Reference* case, the Kershaw Report and the Supreme Court decision are a powerful—and surprising—reaffirmation of provincial rights.

B. The British North America Act, 1867

The constituent act for federalism in Canada is the British North America Act of 1867.⁸⁷ Its special significance is its rejection of the Durham formula for unitary government, as imposed by the Union Act of 1840.⁸⁸ The earlier act had united upper and lower Canada into one colony, but unsuccessful administration led to begrudging acceptance of the separate provincial identity of Quebec (as well as the other provincial units) in the British North America Act of 1867.

That act provided for the union of three British colonies: Canada, Nova Scotia, and New Brunswick, with Canada subdivided into Upper Canada (Ontario) and Lower Canada (Quebec) to form the four foundation provinces. Significantly, the preamble stated that "the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united . . . [for] the Welfare of the Provinces . . . and Interests of the British Empire."⁸⁹ Whatever the intent of the founders, this language is that of contracting parties establishing a convenient economic community, not the urge to establish constitutional "grundnorm."⁹⁰ Compare, for example, the preamble to the United States Constitution, where the

84. 1 S.C.R. 54 (1980).

85. FOREIGN AFFAIRS COMMITTEE, *BRITISH NORTH AMERICA ACTS: THE ROLE OF PARLIAMENT*, H.M.S.O., Sess. 1980–81 (1981).

86. The three provincial high court decisions were rendered on Feb. 3, 1981 (Manitoba), March 30, 1981 (Newfoundland), and April 15, 1981 (Quebec) and reported, successively, in *Reference re Amendment of the Constitution of Canada*, 117 D.L.R.3d 1 (1981), *Reference re Amendment of the Constitution of Canada* (No. 2), 118 D.L.R.3d 1 (1981), and *Reference re Amendment of the Constitution of Canada* (No. 3), 120 D.L.R.3d 385 (1981).

87. 30 & 31 Vict., ch. 3; see *supra* text accompanying notes 58–68.

88. 3 & 4 Vict., ch. 35.

89. Preamble, the British North America Act, 1967, 30 & 31 Vict., ch. 3.

90. The term "grundnorm" is used throughout the British Commonwealth to mean constitutional bedrock, fundamental rules behind which courts may not go.

authors state, "We, the people of the United States," formed "a more perfect union" in order to "promote the general welfare." According to the literal words of the Canadian Preamble, the agents and beneficiaries of the Canadian union were the provinces, not the people—and the "compact" theory of union cannot be easily dismissed.⁹¹ Contrariwise, the United States Constitutional preamble was a deliberate construct altering the first draft, which had begun, "We the States"⁹²

Provision was made in the British North America Act, in section 146, for the admission of the colonies of Prince Edward Island, British Columbia, and Newfoundland (itself, subsequently, a self-governing Dominion).⁹³ With the admission of three more western provinces, and the union of Newfoundland and Canada in 1949, the ten Canadian provinces formed four natural geographic divisions: Ontario, Quebec, the four maritime provinces, and the four western provinces.⁹⁴

The signal omission of the Act of 1867 was the failure to provide any amendment formula; change to the Act of 1867 could only be accomplished by the British Parliament in London. Beginning in 1871, and as recently as 1964, the British Parliament had passed fourteen statutes entitled the British North America Act, amending the Act of 1867, as well

91. The compact theory was reviewed, and restated by Freedman, Chief Justice of Manitoba, in the *Manitoba Reference*:

Confederation was brought about by a compact between its constituent parts. Any change in the nature of the union requires the consent of those parts. That is to say, it requires unanimity on the part of the federal power and of the Provinces. Otherwise there would be a breach of the compact (or contract, or treaty) which was the basis of Confederation.

Reference re Amendment of the Constitution of Canada, 117 D.L.R.3d 1, 22 (1981). Freedman did reject the implications of a compact, after considering the political, historical and legal arguments put forward in Rogers, *The Compact Theory of Confederation*, 9 CAN. BAR REV. 395 (1931), and Alexander, *A Constitutional Straight Jacket for Canada*, 43 CAN. BAR REV. 262 (1965). Alexander concluded that "[t]he compact theory of Confederation has been effectively destroyed." *Id.* at 264.

92. See the speeches of Patrick Henry in the Virginia state ratifying convention, collected in 5 THE COMPLETE ANTI-FEDERALIST 207, 211 (H. Storing ed. 1981):

[W]hat right had they to say, *We, the People*? My political curiosity, exclusive of my anxious solicitude for the public welfare, leads me to ask who authorised them to speak the language of, *We, the People*, instead of *We, the States*? States are the characteristics, and the soul of a confederation. If the States be not the agents of this compact, it must be one great consolidated National Government of the people of all the States.

Compare the surprisingly similar analysis of Andrei Vyshinsky, the great Soviet constitutional lawyer of the Stalin era in A. VYSHINSKY, THE LAW OF THE SOVIET STATE 278 (H. Babb trans. 1948).

93. British Columbia and Prince Edward Island were admitted into the federation by Order in Council, pursuant to § 146 of the British North America Act of 1867, on May 16, 1871, and June 26, 1873, respectively. Newfoundland—no longer a colony—was admitted by the British North America Act, 1949, 12 & 13 Geo. 6, ch. 22.

94. The British North America Act of 1871, 34 & 35 Vict., ch. 28, § 5 confirmed the entry of Manitoba, and Alberta and Saskatchewan were established pursuant to § 2 of the same Act in 1905; cf. Manitoba Act, 1870, 33 Vict., ch. 3; Alberta Act, 1905, 4 & 5 Edw. 7, ch. 3; Saskatchewan Act, 1905, 4 & 5 Edw. 7, ch. 42.

as seven other amending statutes with sundry titles.⁹⁵ On the average then, between 1867 and 1967 (including fifteen occasions in the twentieth century), the United Kingdom has legislated for Canada every five years. As a nation keenly sensitive to its autonomy and identity, the perceived Canadian ignominy was considerable.

C. *The Statute of Westminster, 1931*

The Statute of Westminster of 1931 gave effective British recognition of Dominion (including Australia, New Zealand, South Africa and Newfoundland as well as Canada) political autonomy and a repeal of nineteenth-century colonial detritus. In the case of Canada, however, it clearly and deliberately represented unfinished business. The operative provisions of the Act applied immediately to Canada: section 2 enabled Canada to pass laws which contradicted ("were repugnant to") British law, thus rendering inoperative the Colonial Laws Validity Act of 1865;⁹⁶ section 3 enabled

95. In addition to the principal legislation of 1867, British North America Acts were passed by the United Kingdom Parliament in: 1871, 34 & 35 Vict., ch. 28 (establishment of new provinces and administration of territories); 1886, 49 & 50 Vict., ch. 35 (representation of territories in Parliament); 1907, 7 Edw. 7, ch. 11 (subsidies to provinces); 1915, 5 & 6 Geo., ch. 45 (redefinition of duration of Canada's Twelfth Parliament); 1930, 20 & 21 Geo. 5, ch. 26 (jurisdiction of Western provinces over their natural resources); 1940, 3 & 4 Geo. 6, ch. 36 (unemployment compensation power inserted in § 91, as class 2A); 1943, 6 & 7 Geo. 6, ch. 30 (postponement of redistribution of seats in lower house); 1946, 9 & 10 Geo. 6, ch. 63 (readjustment of representation of the lower house); 1949, 12 & 13 Geo. 6, ch. 22 (entry of Newfoundland); 1949 (No. 2), 12, 13 & 14 Geo. 6, ch. 81 (authority to amend certain aspects of Canadian Constitution inserted as class 1 in § 91); 1951, 14 & 15 Geo. 6, ch. 32 (power of Dominion Parliament to pass laws regarding old age pensions); 1960, 9 Eliz. 2, ch. 2 (tenure of judicial office); and 1964, 12 & 13 Eliz. 2, ch. 73 (supplementary benefits to old age pensions).

The seven other statutes were: Rupert's Land Act, 1868, 31 & 32 Vict., ch. 105 (land controlled by Hudson's Bay Company transferred to the Dominion); Parliament of Canada Act, 1875, 38 & 39 Vict., ch. 38 (privileges of Canadian Parliament); Statute Law Revision Act, 1893, 56 Vict., ch. 14 (repeal of obsolete provisions of British North America Acts); Canadian Speaker Act (Appointment of Deputy), 1895, 2d Sess., 59 Vict., ch. 3 (provision for Deputy Speaker); Statute Law Revision Act, 1927, 17 & 18 Geo. 5, ch. 42 (repeal of obsolete provisions of British North America Acts), Statute of Westminster, 1931, 22 Geo. 5, ch. 4 (clarifies and expands Dominion legislative powers); and Statute Law Revision Act, 1950, 14 Geo. 6, ch. 6 (repeal of obsolete provision from British North America Act, 1867).

In addition to these 21 statutes, legally significant Orders of Her Majesty in Council made under the statutes are part of the Canadian body of law. *See, e.g.*, Order of Her Majesty in Council admitting British Columbia into the Union, May 16, 1871.

96. Section 2 of the Statute of Westminster declares that the Colonial Laws Validity Act of 1865, which invalidates colonial legislation that is repugnant to Imperial legislation, shall not apply to laws made by the Parliament of a Dominion.

Section 7(2) of the statute further declares: "The provisions of section two of this Act shall extend to laws made by any of the Provinces of Canada and to the powers of the legislatures of such Provinces."

Contrariwise, the subordination of the Australian states to the Colonial Laws Validity Act, 1865 continues to bedevil that Commonwealth. *See R. LUMB & K. RYAN, THE CONSTITUTION OF THE COMMONWEALTH OF AUSTRALIA ANNOTATED* 344 (2d ed. 1977). The New South Wales Law Reform

Canada to pass laws with extra-territorial operation (that is, beyond the three-mile limit); and section 4 guaranteed that the British Parliament would not pass laws to extend to Canada (or New Zealand, Australia, Newfoundland, or South Africa) without that Dominion's express request and consent. The effects of the Statute can be gauged by comparing the before-and-after effects of *Nadan v. The King* and *British Coal Corp. v. The King*, cases decided by the Privy Council in 1926 and 1935 respectively.⁹⁷ Canada also had foresight, lacking in Australia, to render the enabling provisions inapplicable to the provinces (Australian state legislatures remain fettered by British law).

More significantly, however, two Canadian problems were not approached. The first was the provision for some machinery to enable local amendment of the British North America Act of 1867—section 7 of the Statute of Westminster expressly excluded the British North America Act from the empowering provisions of section 2.⁹⁸ Second, the request and consent provisions of section 4, respecting British legislation to be made for a willing Dominion, were left, in the case of Canada, quite opaque.⁹⁹ Section 9(3) of the Statute of Westminster specifically designated the "Parliament and Government" of Australia (but not the states) as the requesting and consenting authority for that jurisdiction.¹⁰⁰ In the case of Canada, who was to request and consent? The Dominion Governor-General? The Dominion House of Representatives? The Dominion Government? The Dominion Parliament? The Dominion and Provincial Parliaments? If so, how many, or all, of the latter?

Commission has proposed a states' "Statute of Westminster," to remove the "legal status of dependent colonialism," to enable them to "become masters of their own statute books." See Working Paper on Legislative Powers, Law Reform Commission of New South Wales (undated draft).

97. 1926 A.C. 482; 1935 A.C. 500.

98. Section 7(1) declares: "Nothing in this Act shall be deemed to apply to the repeal, amendment or alteration of the British North American Acts, 1867 to 1930, or any order, rule or regulation made thereunder."

99. Section 4 of the Statute of Westminster declares:

No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.

100. Section 9(3) of the Statute of Westminster provides: "In the application of this Act to the Commonwealth of Australia the request and consent referred to in section four shall mean the request and consent of the Parliament and Government of the Commonwealth."

Similarly, § 3(1) of the Statute of Westminster Adoption Act, 1947 (N.Z.) provides: "For the purposes of section four of the said Statute of Westminster, 1931, the request and consent of New Zealand to the enactment of any Act of the Parliament of the United Kingdom shall be made and given by the Parliament of New Zealand, and not otherwise."

Compare also the slightly different formula in the Cook Islands Constitution Act, 1964. Article 46 of that Constitution requires not only a recital of request and consent in the New Zealand statute, but actual request and consent by the Cook Islands Government (as opposed to the Cook Islands legislature).

Transfer, from London to Canada, of the power to amend the British North America Act was a problem consciously deferred; identification of authority to request and consent was a problem concealed.

D. *Power to Amend: The British North America Act, 1949*

The agenda of 1931, unfinished as it was, received British legislative attention, again ineffectively, in 1949. The power by which a British Commonwealth country could amend its constitution was given to Canada in that year in the British North America Act.¹⁰¹ That statute created a new class of federal powers, being “[t]he amendment . . . of the Constitution of Canada, except as regards” provincial legislative powers, other rights and privileges granted to the Provinces, education, bilingualism, annual parliamentary sessions, and the five-year Parliamentary term.¹⁰² That new provision was inserted as subsection (1), a new enumerated head at the top of the list of federal powers in section 91. Core constitutional concerns, however, continued to reside with the British Parliament. The persistence of colonial fetters was demonstrated by the *Senate Reference* case.¹⁰³

E. *The Senate Reference Case: No Power to Reform the Upper House*

The Canadian Supreme Court served notice in the *Senate Reference* case that it would not be a willing handmaiden to the Dominion government’s impetuous plans to “streamline” Canada’s federalism. The importance of the case, then, is that it signaled a renascent provincialism in the Canadian Supreme Court.

Section 55 of the Supreme Court Act gives the Canadian Supreme Court jurisdiction to decide questions of law concerning the British North America Acts and the legislative powers of Canada’s national and provincial legislatures when such issues are referred to the Court by the Governor General.¹⁰⁴ In 1979 the Governor General asked the Court, in effect,

101. The statutory model for the 1949 United Kingdom Act was the New Zealand Constitution (Amendment) Act 1857 (UK), which gave the New Zealand General Assembly limited powers of constitutional amendment. Neither the 1857 Act (respecting New Zealand) nor the 1949 Act (respecting Canada) gave the Dominion concerned power to alter or abolish its moribund upper house. Only in 1947, when political controversy prompted the adoption of the Statute of Westminster, did New Zealand get full power to amend its own constitution. Repeal of the 1857 Act was also necessary, as that statute had reserved the core sections of the New Zealand Constitution Act of 1852. See W. JACKSON, *THE NEW ZEALAND LEGISLATIVE COUNCIL* (1972). New Zealand re-engineered its legislative structure with relative ease in 1950, in the Legislative Council Abolition Act, 1950.

102. British North America Act (No. 2), 1949, 13 Geo. 6, ch. 81.

103. Re: Authority of Parliament in Relation to the Upper House, 1 S.C.R. 54 (1980).

104. References by Governor in Council: 55(1). Important questions of law or fact concerning:

(a) the interpretation of the *British North America Acts*;

(b) the constitutionality or interpretation of any federal or provincial legislation; . . .

(d) the powers of the Parliament of Canada or of the legislatures of the provinces . . . may be

whether the 1949 Amendment to the British North America Act, section 91(1), gave the federal government power to abolish and/or recreate the Upper House of Canada.¹⁰⁵

To the Government's great surprise, the nine-man court unanimously found that section 91(1), as amended in 1949, did not give the federal government power to repeal or amend those sections of the British North America Act which created and defined the Senate. Although not explicitly reserved or entrenched in section 91(1), the Senate was found to be implicitly protected as an aspect of provincial rights and privileges. Furthermore, the grant of power in the amended Section 91(1) refers to "the Constitution of Canada," not the entire British North America Act. The Court, again surprisingly, interpreted this phrase to mean "the juristic federal unit" and "matters of interest only to the federal government."¹⁰⁶

The Court found ample support for the Senate as a provincial "right or privilege" in the pre-federation conference debates.¹⁰⁷ Having established

referred by the Governor in Council to the Supreme Court for hearing and consideration; and any question concerning any of the matters aforesaid, so referred by the Governor in Council, shall be conclusively deemed to be an important question.

Supreme Court Act, CAN. REV. STAT., ch. 19, § 55.

Contrast the American doctrine of "case or controversy," which prohibits the pursuit, in the United States, of federal advisory opinions. U.S. CONST. art. III, § 2; see *Muskrat v. United States*, 219 U.S. 346 (1911). Compare Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002 (1924) with Davison, *The Constitutionality and Utility of Advisory Opinions*, 2 U. TORONTO L.J. 254 (1938).

105. The Senate of Canada, unlike those of Australia and the United States, but like the former Legislative Council of New Zealand, is an appointed body § 24, British North America Act, 1867. The representation is, in theory, geographical and regional, not demographic. Section 22 of the original Act, as amended by the British North America Act of 1915, provided that each of the four divisions (Ontario, Quebec, the Maritimes, and the West) was to have 24 Senators; by the Terms of Union with Newfoundland, that Dominion was entitled to six Senators. British North America Act, 1915, 5 & 6 Geo. 5, ch. 45, § 1; British North America Act, 1949, 12 & 13 Geo. 6, ch. 22.

The Senate has allegedly served as a parliamentary superannuation scheme. It has not vetoed a bill passed by the Commons since 1940. On the other hand, when party representation concentrates along regional lines, Senate appointments can be used to give regions a voice in government they would not otherwise have. In recent years, for example, the Liberal Government has had few, if any, members in the Lower House from the four western provinces. By appointing and promoting Liberal senators from the West, those provinces can be represented in Cabinet. It should also be noted that Commonwealth upper houses have been the foci of great constitutional struggles. The role of the Australian Senate in Whitlam's dismissal is reviewed and relevant documentation recorded at *Current Topics*, 49 AUSTL. L.J. 645 (1975). In New Zealand, a political wrangle over the Legislative Council induced the adoption of the Statute of Westminster in 1947, as the necessary prerequisite for abolition of the upper house in 1950. In New South Wales, the attempted abolition of the entrenched upper house there led to the celebrated case of Attorney-General for New South Wales v. Trethowan, 1932 A.C. 526. The failure of the South African Senate to sit, unicamerally, with the lower house was the omission which gave rise to *Harris v. Dönges*, [1952] 1 T.L.R. 1245. In the United Kingdom, of course, the Parliament Acts of 1911 and 1949 have redefined the sovereign by recasting the legislative role of the House of Lords.

106. 1 S.C.R. 54, 70 (1980).

107. See, e.g., The Senate Reference, 1 S.C.R. 54, 67, 88 (1980). The potential for Senate-Commons conflict is shown by the Liberal-dominated Senate's refusal to pass the conservative budget during the months January-March 1985. See, e.g., Rose, *Reluctance in the Red Chamber*, Maclean's,

the historical background of the Senate as an essential part of the federal legislative process and a pronounced “right or privilege,” the court concluded its “provinces’ rights” argument with these words from Lord Sankey L.C. in the Privy Council:

Inasmuch as the Act embodies a compromise under which the original Provinces agreed to federate, it is important to keep in mind that the preservation of the rights of minorities was a condition on which such minorities entered into the federation, and the foundation upon which the whole structure was subsequently erected. The process of interpretation as the years go on ought not to be allowed to dim or to whittle down the provisions of the original contract upon which the federation was founded, nor is it legitimate that any judicial construction of the provisions of sections 91 and 92 should impose a new and different contract upon the federating bodies.¹⁰⁸

F. Canada’s Constitutional Reforms

In response (or perhaps in desperate reaction) to the *Senate Reference* case, and in fulfillment of political promises, Prime Minister Trudeau published the text of a joint resolution of the two houses of the Canadian Parliament on October 2, 1980, which called on the Queen to present to the Parliament of the United Kingdom proposed legislation to be known as the Canada Act; fourteen months later, on December 2, 1981, it was approved by a margin of 246 to 24. A few days later, on December 8, 1981, it passed the Canadian Senate, by 59 votes to 23, and the French-speaking Minister of Justice, Jean Chretien, carried the resolution to Buckingham Palace the next day.

The Canada Act contains two schedules, being French and English versions of the Constitution Act, which are declared to have the force of law in Canada by sections 1 and 3 of the Canada Act. There are two main components of the Constitution Act: 1) a Charter of Rights and Freedoms; and 2) machinery to enable Canada to amend any part of its Constitution. The Canada Act does not repeal the British North America Act, 1867, but that Act, and the fourteen British statutes of the same name, passed in the years 1871–1964, are to be known and cited as the Constitution Acts. The Canada Act was given royal assent on March 2, 1982, and was proclaimed law in Canada on April 17, 1982.

March 4, 1985, at 34.

108. The *Senate Reference*, 1 S.C.R. 54 (1980) (citing *Re: The Regulation and Control of Aeronautics in Canada*, 1932 A.C. 54, 70). The decision may also imply that a sovereign body, created by statute, cannot confer its power on a different or recast sovereign body. Such an implication would contradict the holding of the Privy Council in *Hodge v. R.* that local legislatures have power to delegate similar to that of the Imperial Parliament. 9 App. Cas. 117 (1883).

1. *Charter of Rights*¹⁰⁹

Unlike the current statutory Bill of Rights, which aids in the interpretation of federal legislation only, the Charter of Rights becomes "the Supreme Law of Canada," and any provincial or federal law which is inconsistent with the Charter is "to the extent of the inconsistency, of no force and effect."¹¹⁰

109. The paragraphs which follow are a bare description of what Justice McDonald calls "a new ballgame" for Canadian judges and lawyers. See McDONALD, *LEGAL RIGHTS IN THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS* xxiii (1982). Litigation will be intensive and literature voluminous. The present study does not purport to begin analysis of the judicial task. See generally McDONALD, *id.*; Laskin, *The Canadian Constitutional Proposals*, 1981 PUB. L. 340; THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS (W. Tarnopolsky & G. Beaudoin eds. 1982); THE CANADIAN CHARTER OF RIGHTS: LAW PRACTICE REVOLUTIONIZED (A. MacKay ed. 1982); Samek, *Untrenching Fundamental Rights*, 27 MCGILL L.J. 755 (1982); Russell, *The Effect of a Charter of Rights on the Policy-Making Role of Canadian Courts*, 25 CAN. PUB. ADMIN. 1 (1982); Tarnopolsky, *The Historical and Constitutional Context of the Proposed Canadian Charter of Rights and Freedoms*, 44 L. & CONTEMP. PROBS. 169 (1981).

Decisions based on the Charter will be annotated in a new looseleaf service, CAN. CHARTER OF RTS. ANNOT. (CANADA LAW BOOK, LTD.).

110. Canada Act, 1982, ch. 11, § 52, sched. B. Lawyers in the United States, in particular, need to be reminded that in contrast to the new constitutional Charter of Rights, the "old" Bill of Rights, which was passed by the Canadian Parliament in 1960, was not "The Supreme Law of the Land." It was an ordinary statute passed in the ordinary way, subject to express repeal, probably subject to implied repeal, and not binding on the provinces. That statutory Bill of Rights, 8 & 9 Eliz. 2, ch. 44, might well be called an Acts Interpretation Act: § 2 provides that "Every law of Canada shall, unless expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied" as not to abrogate the rights asserted. See Laskin, *An Inquiry into the Diefenbaker Bill of Rights*, 37 CAN. BAR REV. 77 (1959); Lyon, *A Progress Report on the Canadian Bill of Rights*, 3 DALHOUSIE L.J. 39 (1976); Tarnopolsky, *The Canadian Bill of Rights from Diefenbaker to Drybones*, 17 MCGILL L.J. 437 (1971); Tarnopolsky, *The Canadian Bill of Rights and the Supreme Court Decisions in Lavell and Burnshine: A Retreat from Drybones to Dicey?*, 7 OTTAWA L. REV. 1 (1975).

The "Supremacy Clause" of the Constitution Act, § 52, is analogous to the second paragraph of U.S. CONST. art. VI. Legislative powers granted to the Australian Parliament or preserved in the state legislature are granted or preserved "subject to this Constitution." AUSTL. CONST §§ 51, 52, 106, 107. The substantive content of the charter, briefly described, includes:

§ 2: Fundamental freedoms of conscience, religion, thought, belief, opinion, expression (including a free press), peaceful assembly and association.

§§ 3-5: Political rights of suffrage, annual legislatures sessions, and maximum five-year terms (regarding all 11 Canadian legislatures).

§ 6: The mobility right to leave Canada, and return, and the right to live and work equally in any province.

§§ 7-14: Criminal procedure rights, including, inter alia, the right to an interpreter.

§ 15: Equality rights, being non-discrimination on grounds of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

§§ 16-23: Linguistic equality and education rights respecting the French and English languages.

§ 28: In addition to the equality rights in § 15, all rights and freedoms are guaranteed equally to male and female persons.

The flavor of Charter litigation may be judged from the following sample: *R v. Operation Dismantle*, 3 D.L.R.4th 193 (1983) (§ 7, life, liberty, or property; cruise missile testing); *Re Law Soc'y of*

Provincial opposition to the Charter, as promulgated, was considerable; only Ontario and New Brunswick supported the original version. Further provincial favor was purchased by the insertion of a “notwithstanding” clause which allows any provincial legislature to opt out of the operation of section 2 or sections 7–15.¹¹¹ The province need only declare that the provincial Act or provision thereof operates notwithstanding, and review that declaration every five years. In addition, the mobility rights, in section 6, did not apply to the purchase of land, and section 6(4) now excepts provinces with high unemployment.¹¹² The Charter, therefore, became something of a menu, with the provinces able to order therefrom a la carte. After these compromises were made and a compromise concerning the local amendment formula was put in place, the other provinces came round to support the package, save only Quebec. At the time the British Parliament proceeded, therefore, ten of the eleven Canadian governments favored the package. Quebec continued to raise legal challenges to the Act.

a. No Absolutes: Reasonable Limits

Several aspects of the Charter deserve special mention. First, none of the rights and freedoms is absolute. Qualifying words are used in many individual sections, such as section 8, “the right to be secure against *unreasonable* search or seizure” and section 9, “the right not to be *arbitrarily* detained or imprisoned.”¹¹³ Overriding all the guarantees, however, is section 1, which subjects the entire charter “to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”¹¹⁴

Manitoba and Savino, 1 D.L.R.4th 285 (1984) (§ 2, freedom of expression; lawyer’s advertising); Re Luscher and Deputy Minister, Revenue Can. Customs and Excise, 149 D.L.R.3d 243 (1983) (§ 2, freedom of expression; indecent publications legislation); Re Ontario Film and Video Appreciation Soc’y and Ontario Bd. of Censors, 147 D.L.R.3d 58 (1983) (§ 2, freedom of expression; film censorship); R v. Trask, 150 D.L.R.3d 161 (1983) (§ 10, right to counsel; “breathalyzer” legislation); Re Mitchell and the Queen, 150 D.L.R.3d 449 (1983) (§ 9, arbitrary detention and § 12, cruel and unusual punishment; habitual criminal legislation); Morgentaler v. Ackroyd, 150 D.L.R.3d 59 (1983) (§ 7, life, liberty and security of the person; abortion legislation).

111. Section 33(1) declares: “Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision in Section 2 or Sections 7 to 15 of this Charter.”

112. Section 6(2)(a) protects only “moving to and taking up residence” in any province.

Tiny Prince Edward Island, with a land area of only 2,184 square miles, may have a legitimate fear that outsiders will purchase the entire province.

The unemployment section, § 6(4), allows provinces, presumably Newfoundland, to discriminate in favor of its own residents in public hiring. See Newfoundland and Labrador Petroleum Regulations, Nfld. REG. 139/78, § 124 (1977).

113. Sections 8 and 9, Constitution Act, 1982 (emphasis added).

114. *Id.* § 1. This formula is a revision of the original loose-jointed exception clause which

Two examples may explain the future judicial task: if provincial laws establish sixteen as the minimum driving age and sixty-five as the maximum working age, the fifteen-year-old pre-driver and the sixty-six-year-old forced retiree may claim protection under section 15 of the Charter, voiding the provincial law as discrimination based on age.¹¹⁵ The court might decide that the discrimination here is a reasonable one, if the provincial government can meet the burden of demonstrable justification by a sociological-biological brief.

b. Provinces' Charters

Provincial opposition cannot be characterized simply as conservative or reactionary opposition to the Charter. The opposition was not based on a fear of being restrained in respect to their own citizenry, but rather a desire to seize the opportunity to restrict the Dominion's powers to legislate in matters of a local or private nature (such as natural resources). Indeed, many of the provinces have their own charter.¹¹⁶ Perhaps the best example is that of Quebec, which continues to oppose the Charter; their own Charter of Human Rights and Freedoms protects the same equality rights as does the federal charter and also includes sexual orientation, civil status, political conviction, and social condition (but minus the federal protection of physical disability).¹¹⁷ In addition, the Quebec Charter protects children, the aged, the mentally defective, and the mentally ill.¹¹⁸

2. Amendment Formula

The *Senate Reference* case established that Canada's power to modify the British North America Act was extremely limited. While Canadians continued to search for an acceptable mechanism, the British Parliament

deferred the rights and freedoms "to such reasonable limits as are generally accepted in a free and democratic society with a parliamentary system of government." Section 1 of the Constitution Act, as proposed in the original Notice of Motion put before the Canadian Houses. Any limitation on rights and freedoms, if "generally accepted" by majority vote in a democratically elected House of Commons, would be constitutional. Minimal scrutiny would extend no further than judicial notice taken of a similar law having been passed by some other parliament.

115. Constitution Act, 1982, §15(1): "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability."

116. See Saskatchewan Human Rights Code, SASK. STAT., 1982, ch. S-24.1; Alberta Bill of Rights, ALTA. REV. STAT., 1982, ch. A-16. Neither the Saskatchewan Code nor the Alberta Bill of Rights is entrenched or inserted in the provincial constitution. The Alberta legislation resembles the Canadian Bill of Rights, while Saskatchewan has promulgated detailed control of housing, public services, and employment, to be administered by a Human Rights Commission.

117. Que. Stat. 1975, ch. 6, as amended by Que. Stat. 1977, ch. 12, § 10.

118. Que. Stat. 1977, ch. 12, §§ 39, 48.

remained “a bare legislative trustee,” to use the expressive term of Mr. Justice Rand.¹¹⁹ The original amendment proposal, made in October 1980, was the so-called modified Victoria Plan, which required approval by the legislatures of Ontario, Quebec, at least two of the four Maritime provinces with at least fifty percent of the Maritime population, and at least two of the four Western provinces with at least fifty percent of the Western population.¹²⁰

The formula now used, and acceptable to all the provinces but Quebec, allows for domestic constitutional amendment where two-thirds of the provinces with at least 50 percent of the population approve.¹²¹ A proviso creates the prospect of “checker-board federalism,” since a province may opt out of any constitutional amendment so long as the resolution opposing that amendment is passed within a year of the initiation of the nationwide procedure.¹²²

3. *Natural Resources: Provincial Control*

In order to gain prairie and western provincial support for the new constitution, provisions were added which surrender federal control over natural resources.¹²³ Perhaps the most significant and clear increase in

119. Rand, *Some Aspects of Canadian Constitutionalism*, 39 CAN. BAR REV. 135, 145 (1960). The Canadian Supreme Court noted that the issue was pursued unsuccessfully at ten federal-provincial conferences, held in 1927, 1931, 1935, 1950, 1960, 1964, 1971, 1978, 1979, and 1980. Reference re Amendment of the Constitution of Canada, 125 D.L.R.3d 1, 103 (1981).

120. See SPECIAL JOINT COMM. OF THE SENATE AND THE HOUSE OF COMMONS ON THE CONSTITUTION OF CANADA, FINAL REPORT, 28th Parl., 4th Sess., app. B, § 41 (1972). Ironically that formula gave a veto to Quebec. In the flurry of compromise which followed, Quebec distanced itself so far from the bargaining table that the final formula was more objectionable, from the point of view of Quebec, than the introduction copy. Quebec can, however, opt out of any amendment by § 38(3) of the Constitution Act, 1982.

For a full account of the various unsuccessful attempts at patriation and amendment formulae, see Lederman, *The Process of Constitutional Amendment for Canada*, 12 MCGILL L.J. 371 (1966-67), and Lederman, *Constitutional Amendment and Canadian Unity* in LAW SOCIETY OF UPPER CANADA, SPECIAL LECTURES 1978 (1978). (These essays, and others by Prof. Lederman, are usefully collected in W. LEDERMAN, CONTINUING CANADIAN CONSTITUTIONAL DILEMMAS (1981)).

121. An amendment could not be passed by the eight maritime and Western provinces, as Quebec and Ontario have approximately 62% of the Canadian population. An amendment could pass with Ontario, any three maritime Provinces, and any three Western Provinces.

122. Constitution Act, 1982, §§ 38(3), 39. An irregular pattern of constitutional amendment, plus the “menu” of rights and freedoms possible under the § 33 “notwithstanding” clause produces a truly “checker-board federalism.”

123. A new part VI of the Constitution Act, not present in the Resolution of October 1980, adds a new § 92A, which creates provincial power to: (1) control exploration for mineral resources in the province; (2) control development, conservation, and management of mineral, forest, and hydro-electric resources; (3) tax such primary production; and (4) regulate the inter-provincial shipment within Canada of such products, so long as the taxation and regulation does not discriminate in pricing or supply to various parts of Canada. Part VI contains only two sections: § 50 creates new provincial

provincial power over natural resources is the new power to tax indirectly mineral, forest and hydroelectric resources. Such a power had previously been held not to exist.¹²⁴ An immediate payoff for the provinces, or at least one province, and concrete evidence of the new provincial status, is the so-called "Atlantic Accord" signed in February 1985, between Newfoundland and the Dominion Government, giving that province the lion's share of control and taxation power over federally owned off-shore oil deposits.¹²⁵

4. *Rights of Native Peoples*

The original package, as introduced in October 1980, incorporated a bare reference to native peoples in clause 24, subtitled "Undeclared Rights and Freedoms." That clause granted no constitutional protection but simply recorded the non-impact of the Charter on any existing "rights and

power ("The Constitution Act 1867 (formerly named the British North America Act, 1867) is amended by adding thereto, immediately after Section 92 [a new section entitled] Non-Renewable Natural Resources, Forestry Resources and Electrical Energy."); § 51 adds a new sched. 6 which defines non-renewable resources and forestry resources.

The British North America Act continues to give the central government control over international commerce and exports out of Canada, and in case of a conflict of statutory control of exports, the law of the Parliament of Canada is to prevail. British North America Act, 1867, 30 & 31 Vict., ch. 3, § 91(2).

124. In 1973, Saskatchewan passed a "mineral income tax," or windfall profit tax, on oil and gas production revenues from freehold land in the province. See Oil and Gas Conservation, Stabilization and Development Act, 1973, Sask. Stat., ch. 72; An Act to Amend the Oil and Gas Conservation, Stabilization and Development Act, 1973-74, Sask. Stat., ch. 73; An Act to Amend the Mineral Resources Act, 1974, Sask. Stat., ch. 64. The tax was measured as one hundred percent of the difference between the price received at the well-head, and the "basic well-head price," a statutory figure approximately equal to the price per barrel received by processors prior to the energy crisis. Oil and gas produced from non-freehold property was subject to a "royalty surcharge" calculated in the same manner. Those taxes were held to be export taxes imposed upon oil production and thereby characterized as an unconstitutional indirect taxation, ultra vires of a provincial legislature. *Can. Indust. Gas & Oil Ltd. v. Gov't of Sask.*, 2 S.C.R. 545 (1978). The Dominion government is empowered to raise money by "any Mode or System of Taxation" (§ 91(3) of the British North America Act, 1867); provincial governments are empowered to raise money only by "Direct Taxation within the Province." Provincial taxation, therefore, stands or falls by its characterization as direct or indirect. Section 92A, as inserted into the British North America Act, 1867 by § 50 of the Constitution Act, 1982, reverses that decision. The American counterpart to the Saskatchewan mineral tax is manifested by the "Sagebrush Rebellion," the attempt by western states to secure greater control—to conserve or to exploit—over the immeasurable resource wealth standing on, running over, and buried beneath the public lands of the west. On one hand a 30% resource severance tax (on contract sales values of extracted coal) was upheld in *Commonwealth Edison & Co. v. Montana*, 453 U.S. 609 (1981); on the other hand a state prohibition on the export of natural minnows out of state for sale was ultra vires of the state in *Hughes v. Oklahoma*, 441 U.S. 322 (1979). The basic issue remains whether a producer state may hoard, conserve, and eventually exploit its natural resources, while imposing the cost on consumers in other states. Does the national interest in both the unimpeded flow of energy resources and the thoughtful restriction on over-hasty extraction outweigh the proprietary interest of the western states? Does the original compact provide the answer? Compare Huffman, *Governing America's Resources: Federalism in the 1980's*, 12 ENVTL. L. 863 (1982) with Note, *The Commerce Clause and Federalism: Implications for State Control of Natural Resources, Forestry Resources*, 50 GEO. WASH. L. REV. 601 (1982).

125. See Maclean's, Feb. 25, 1985, at 26.

freedoms” of the native peoples.¹²⁶ The somewhat backhanded clause described above was expanded to include specific protection for the post-war Proclamation of 1763, wherein George III reserved the “Hunting Grounds” of the “several nations or Tribes of Indians with whom we are connected” and any land claims settlements.¹²⁷ More significant affirmative protection was granted in an entirely new section 35, which stands alone in new part II.¹²⁸ That clause “recognizes and affirms” the existing aboriginal and treaty rights, which thus acquire constitutional status, proof against provincial or federal legislation.¹²⁹

Member organizations of the National Indian Brotherhood (representing “band” Indians) continue to oppose the package, however, because these successes amount to only a third of the Indian objectives.¹³⁰ Aboriginal peoples failed to secure increased autonomy, as an internal colony or even an eleventh province, and they achieved no role in the process of constitutional amendment.¹³¹

G. *The Kershaw Report*

The Foreign Affairs Committee of the British Parliament took note of the Canadian Constitutional struggle and collectively deliberated on the questions raised relevant to the United Kingdom. The “First Report from the

126. Clause 24 of Proposed Draft, October 1980 stated: “The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada, including any rights or freedoms that pertain to the native peoples of Canada.”

127. Clause 24 became § 25 of the statute as promulgated:

The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada, including:

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

The Royal Proclamation is recorded in CAN. REV. STAT., app. 123–29 (1970).

128. Section 35(1) states that “[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.” Section 35(2) defines the aboriginal peoples of Canada to include the Indian, Inuit (often known as “Eskimos”), and Metis (also known pejoratively as “half-breed”) peoples.

129. The Dominion government is given exclusive power to legislate for “Indians, and Lands reserved for the Indians.” British North America Act, § 91(24).

130. See W. Many Fingers, *Comment: Aboriginal Peoples and the Constitution*, 19 ALTA. L. REV. 428 (1981).

131. Under §§ 37(1) and 37(2), as a weak substitute for a voice in constitutional amendment, the aboriginal peoples are to be invited to “participate in discussions” respecting “constitutional matters that directly affect the aboriginal peoples of Canada”

For a detailed analysis of the constitutional position, and the constitutional ambition of the status of “band” Indians, Metis, and Inuit, see Sanders, *Aboriginal Peoples and the Constitution*, 19 ALTA. L. REV. 410 (1981).

Foreign Affairs Committee, Session 1980–81: British North America Acts: The Role of Parliament”¹³² is a useful reminder that *twelve* governments—not eleven—have a legitimate interest in the British North America Acts. It is more reasonable to expect—and require—there be some measure of concurrence amongst them than to expect the Dominion government in Ottawa to dictate unilaterally to the other eleven. Expressed in terms of its legal function, the Kershaw Report examines any mechanism necessary to fulfill and activate section 4 of the Statute of Westminster 1931 with respect to the Dominion of Canada.¹³³

The Canadian Government baldly asserted that “the British Parliament or Government may not look behind any federal request for amendment Whatever role the Canadian provinces might play in constitutional amendments is a matter of no consequence as far as the U.K. Government and Parliament are concerned.”¹³⁴ The Canadian Government implicitly—perhaps unwittingly—acknowledged its own overstatement in the same paragraph: “the British Parliament is bound to act in accordance with a *proper* request from the Federal Government”¹³⁵ The word “proper” is, of course, a word of limitation—the British Parliament has the right and the duty to sort out *improper* requests, as well as requests which might emanate from a source without authority.

The Foreign Affairs Committee may have acted prematurely: no such request was at that time before either House. No province appeared as petitioner, and the Federal Government was not a party or even represented before the Committee.¹³⁶ The Committee did consider submissions by five Canadian provinces, as well as documents prepared by the Federal Government. The Committee also heard expert evidence from such scholars as Dr. Geoffrey Marshall of Oxford and Professor H.W.R. Wade of Cambridge. The Report itself is a rich source of constitutional deliberation. Space permits only a brief recital of the Committee’s conclusions:

132. H.M.S.O. (1981). The name of the Chairman of the Committee is used in the short title of the Report.

133. In other words, precisely what participation, if any, is expected from how many provinces when the Dominion requests and consents to the passage of United Kingdom legislation affecting the Dominion and those provinces?

134. Dominion Dep’t of External Affairs, Patriation of the British North America Act (Oct. 2, 1980) (Background paper), *quoted in* Kershaw Report, *supra* note 132, at viii.

135. *Id.* (emphasis added).

136. Compare the official Petition of Secession presented to a Joint Committee of the House of Lords and the House of Commons by the State of Western Australia in 1935: J. Comm. Rep. (H.C. No. 88, 1935). Australian states have made a necessary and continuing practice of petitioning the United Kingdom Parliament for law reform, as they continue to be bound by the Colonial Laws Validity Act, 1865. The Canadian provinces, hamstrung with respect to Constitutional amendment, were liberated from the British statute book otherwise by § 7(2) of the Statute of Westminster.

The arguments for and against entertaining the Western Australian Petition are reported in *Western Australian Secession Petition—Arguments Before the Joint Select Committee*, 9 AUSTL. L.J. 141 (1935).

Patriation of the Canadian Constitution

1. The Parliament of the United Kingdom retains in law the unchallenged power and duty to amend fundamental parts of the Canadian Constitution. This retention is expressly recognized in section 7 of the Statute of Westminster and may not be unilaterally surrendered by the United Kingdom. On the other hand, the exercise of the power is regulated by constitutional requirements.

2. The Parliament of the United Kingdom must take account of Canada's federal character.

3. The Parliament of the United Kingdom need not accept without question every request from the Ottawa Government.

4. On the other hand, there is no requirement that the federal proposal be supported unanimously by the provinces concerned.

5. The Parliament of the United Kingdom is bound to exercise its own best judgment in deciding whether a proposal represents the "clearly expressed wishes of Canada as a federally structured whole."

6. An appropriate level and distribution of Provincial concurrence might be the least demanding of the formulae for post-patriation amendments suggested by Canada.

7. The Parliament of the United Kingdom must not debate or deliberate about the wisdom of the details of the constitutional package. If the package is procedurally appropriate, the package must be passed without deletion or alteration.¹³⁷

A parliamentary committee report is, of course, neither law nor convention, nor does it necessarily represent the political conviction of the government of the day. The Kershaw Report, in particular, may have been investigative, speculative, gratuitous, and premature. Nevertheless, this historic report signaled British awareness of provincial sensitivity, nourished provincial opposition, and demolished the possibility that Prime Minister Trudeau might present the provinces with a *fait accompli* early in 1981.

H. Decisions of Provincial Courts

Within two weeks of the introduction of the resolution into the Federal Parliament (October 2, 1980), the provincial premiers met in Toronto (October 14, 1980) to coordinate their opposition to the Trudeau package.

137. The conclusions and recommendations of the Committee are most accessible in its report, *supra* note 132, xi-xiii.

Only Ontario and New Brunswick supported patriation on Mr. Trudeau's terms at that time, and a majority of provinces chose to do battle with the Trudeau forces in the provincial courts. The constitutional question of unilateral request and consent by Ottawa was "referred," by statutory mechanisms, to three representative provincial courts of appeal: Newfoundland, representing the Maritime provinces;¹³⁸ Manitoba, representing the Western provinces;¹³⁹ and Quebec, representing itself.¹⁴⁰ In each reference, the Attorney-General of Canada was joined by his counterparts from Ontario and New Brunswick, while the "host" Attorney-General in each case was joined by the other seven Attorneys-General in opposition.

The first question in each reference ingenuously set the stage for the subsequent constitutional debate by asking whether the proposed resolution would affect provincial powers and federal-provincial relationships. Three judges from Manitoba found that preliminary question premature and speculative; otherwise, each court unanimously answered that the proposal would indeed have such an effect. The substantive reference, as framed in Manitoba and Newfoundland, inquired whether the Canadian constitution required provincial agreement to such proposals (the implication being that if the Constitution was silent, no agreement was required). The question was turned around in Quebec, where the court was asked, "What constitutional provision empowers the federal government 'to go it alone?'" (The implication was that if the Constitution was silent, there was no such Dominion power.) The Dominion won the first round, narrowly, on February 3, 1981, as the five-man Manitoba court ruled for the Federal power, three-to-two.¹⁴¹ The provinces took the second round on March 30, 1981 with a sharp three-to-zero victory in the Newfoundland Court.¹⁴² That setback prompted Mr. Trudeau to offer to postpone unilateral action until the Supreme Court of Canada gave its opinion. Dominion forces then won a major victory in Quebec, with a four-to-one decision on April 15, giving a split two-to-one overall decision to Mr. Trudeau in the three provincial courts.¹⁴³

Appeals were taken as of right in each case to the Supreme Court of Canada. Manitoba, joined by the seven dissenting provinces, appealed from the decision of its own court; the Dominion, joined by Ontario and New Brunswick, appealed from the decision of the Newfoundland court;

138. The statutory mechanism of referral is a provincial counterpart to the Dominion referral power. *See supra* note 103; *see also* Nfld. REV. STAT., ch. 187, § 6 (1970).

139. The referral mechanism in Manitoba is MAN. REV. STAT., ch. 180, § 2 (1970).

140. The referral mechanism in Quebec is QUE. REV. STAT., ch. R-23, § 1 (1977).

141. Reference re Amendment of the Constitution of Canada (No. 2), 118 D.L.R.3d 1 (1981).

142. Reference re Amendment of the Constitution of Canada, 117 D.L.R.3d 1 (1981), 7 Man.(2d) 269 (1981); [1981] 2 W.W.R. 193.

143. Reference re Amendment of the Constitution of Canada (No. 3), 120 D.L.R.3d 385 (1981).

and Quebec with the seven dissenting provinces appealed from the Quebec Court of Appeal.¹⁴⁴

I. Decision of the Supreme Court of Canada

The Supreme Court of Canada held by a seven-to-two majority that there is no *legal* rule restraining the Dominion government in Ottawa from unilaterally—without the consent of the provinces—requesting the Parliament of the United Kingdom to amend the British North America Act in a way which would affect provincial powers and federal-provincial relations.¹⁴⁵ By a six-to-three majority, the court found that the Ottawa government could be so restrained by convention.¹⁴⁶ The nub of the decision is consideration of the idea of constitutional convention: the evolution of convention as a fetter on otherwise discretionary power in a federal system and the companion ratio that constitutional practice, having ripened into convention, does not crystallize into law. The affirmation—or discovery—of convention by historical review is the core of the six-man decision, while case and doctrinal analysis is characteristic of the seven-man rejection of convention as law. Taken jointly, the decisions represent a narrow legal victory, claimed by Ottawa, and a broad political affirmation of provincial rights (claimed generally by provincial spokesmen).

144. Reference re Amendment of the Constitution of Canada (Nos. 1,2, and 3), 125 D.L.R.3d 1 (1981) [hereinafter cited as *Dominion Reference*].

145. What is central here is the untrammelled authority at law of the two federal Houses to proceed as they wish in the management of their own procedures and hence to adopt the Resolution which is intended for submission to Her Majesty for action thereon by the United Kingdom Parliament. The British North America Act, 1867 does not, either in terms or by implication, control this authority or require that it be subordinated to provincial assent.

Dominion Reference, 125 D.L.R.3d at 48–49. The seven-man majority opinion—subtitled in the report “MAJORITY: LAW”—is at 12–49. The two-man minority opinion—subtitled in the report “DISSENT: LAW”—is at 49–79.

It should be noted that had the Dominion proceeded unilaterally, the submission to Her Majesty may have had to proceed through unorthodox channels. See *infra* note 172.

146. “We have reached the conclusion that the agreement of the Provinces of Canada, no views being expressed as to its quantification, is constitutionally required for the passing of the (proposed Resolution) and that the passing of this Resolution without such agreement would be unconstitutional in the conventional sense.” *Dominion Reference*, 125 D.L.R.3d at 107. The six-man majority opinion—subtitled in the report MAJORITY: CONVENTION—is at 79–107. The three-man minority opinion—subtitled in the report “DISSENT: CONVENTION”—is at 107–27.

A jurisprudential paradox arises at this point. If the convention did not and could not crystallize into law, should not the court stop at that point? Why is a court, pursuant to a legal reference, examining a non-legal question? Presumably the three-man dissent would have preferred the majority to decline to answer, on the grounds that the nature and content of a convention is not a justiciable issue. *Id.* at 107.

The six-man majority embarked upon the exercise because of its constitutional significance, and because (they said) other courts “have done this very thing many times in England and the Commonwealth.” *Id.* at 88.

The decision can be analyzed in three ways: 1) by reference to the two questions carved out of one interrogatory by the court; 2) by description of the three blocks of justices which coalesced naturally; or 3) by dissection of the four opinions presented on the two questions.

Avoiding a simple "yes" or "no" to a question about "legality" or "constitutionality," the court broke the reference into discrete parts: "Is there a convention?" and "If there is a convention, is it a *legal* (enforceable) restraint on the federal government?"

The first question, antecedent to the constitutional claim of crystallization, was whether such a convention did exist. The court asked itself, "How may we know a convention?" and took an answer from Sir Ivor Jennings' *The Law and the Constitution*.¹⁴⁷ Expressly adopting Sir Ivor's text, the court pursued a three-step test: 1) What are the precedents? 2) Did the actors in the precedents consider themselves bound by a rule? 3) Is there a reason for the rule? The six-man majority answered those questions in the affirmative.

The central thesis of the eight provinces regarding convention was advanced by the Attorney-General of Manitoba: "a convention may crystallize into law and . . . the requirement of provincial consent to the kind of Resolution that we have here, although in origin political, has become a rule of law."¹⁴⁸ The seven-man majority concluded that "no instance of an explicit recognition of a convention as having matured into a rule of law was produced."¹⁴⁹ Some eight cases, cited against the principle of crystallization, were then reviewed.

The most imposing support for the "crystallization" theory was found in the words of former Chief Justice Duff in the *Labour Conventions* case.¹⁵⁰ There the Supreme Court considered a reference concerning federal powers to enact minimum wage-maximum hour legislation, pursuant to an International Labour Conference Convention. Justice Duff, joined by two other justices, held that the treaty power in section 132 of the British North America Act implicitly gave Ottawa the power to legislate in fulfillment of such treaty obligations, although the particular subject matter area had been reserved to the provinces by section 92(13).¹⁵¹ Justice Duff further

147. *Dominion Reference*, 125 D.L.R.3d at 90, citing JENNINGS, *THE LAW AND THE CONSTITUTION* 136 (5th ed. 1959).

148. *Dominion Reference*, 125 D.L.R.3d at 22.

149. *Id.* at 22.

150. The official citation of the *Labour Conventions* case is Attorney-General of Ont., Reference re Weekly Rest in Indust. Undertakings Act, [1936] 3 D.L.R. 673; 1936 S.C.R. 461. The citation of the Privy Council decision is [1937] 1 D.L.R. 673; 1937 A.C. 326; [1937] 1 W.W.R. 299.

151. Section 132 bestows upon the Dominion "all Powers necessary or proper" to perform "the Obligations of Canada or any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries." Section 92(13)

held that this power existed by the constitutional development, by convention, of Canada into a treaty-making, independent juristic unit.¹⁵² It was significant that Justice Duff's holding related to the eclipse of provincial power—clearly defined by statute—by crystallization of convention.

It was still more significant, however, said the seven-man majority, that Justice Duff's ruling was given in a three-to-three decision. The Privy Council expressly rejected the Duff opinion, saying "the Dominion cannot merely by making promises to foreign countries clothe itself with legislative authority inconsistent with the constitution which gave it birth."¹⁵³

Express recognition of a convention was sought in the *Madzimbamuto* case of 1969, where the Privy Council noted the convention that the Parliament of the United Kingdom would not legislate without the consent of the Government of Southern Rhodesia on matters within the competency of the legislature there.¹⁵⁴ Counsel for Manitoba unsuccessfully "sought to

gives the Province authority to legislate for "Property and Civil Rights."

The similar but distinctively different American phrase is Power to "make all Laws which shall be necessary *and* proper to carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States." U.S. CONST. art. I., § 8 (emphasis added). Does the Canadian grant include "necessary but improper" or "unnecessary but proper" powers?

152. Constitutional law consists very largely of established constitutional usages recognized by the courts as embodying a rule of law As a rule, the crystallization of constitutional usage into a rule of constitutional law to which the courts will give effect is a slow process extending over a long period of time; but the Great War accelerated the pace of development in the region with which we are concerned.

[1936] 3 D.L.R. at 678–79; 1936 S.C.R. at 476–78, *quoted in Dominion Reference*, 125 D.L.R.3d at 24.

153. [1937] 1 D.L.R. 673, 682–83 (Lord Atkin); 1937 A.C. 326, 352; [1937] 1 W.W.R. 299; 310–11.

A contrary result, on precisely the same claim of "bootstrap" treaty-making power, was reached in *Commonwealth of Austl. v. Tasmania*, 57 AUSTL. L.J.R. 450 (1983), noted in Lane, *The Federal Parliament's External Affairs Power: The Tasmanian Dam Case*, 57 AUSTL. L.J. 554, 554 n.6 (1983). The Australian High Court enabled the federal (Commonwealth) government to pass a law restraining a state from building a dam by finding the vires for the Commonwealth statute in the World Heritage Convention, ratified by the Commonwealth pursuant to its external affairs power. This decision illustrates the diametrically opposed trajectories of Australian and Canadian federalism.

The Supreme Court of the United States had earlier taken the Duff position, saying "It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with but that a treaty followed by such an act could." *Missouri v. Holland*, 252 U.S. 416, 433 (1920) (Holmes, J.).

Fear of federal legislation, made pursuant to United Nations treaties, led to the proposal of the Bricker Amendment to the Constitution, in 1953. The second clause of that proposal, as originally submitted, took the Privy Council view: "A Treaty shall become effective as internal law in the U.S. only through legislation which would be valid in the absence of treaty." See Sutherland, *Restricting the Treaty Power*, 65 HARV. L. REV. 1305 (1952). The arguments for and against the amendment are set out in Bricker, *Safeguarding the Treaty Power*, 13 FED. B.J. 77 (1952); Bricker & Webb, *Treaty Law vs. Domestic Constitutional Law*, 29 NOTRE DAME L. 529 (1954); and MacChesney, *The Treaty Power and the Constitution: The Case Against Amendment*, 40 A.B.A.J. 203 (1954). The proposal never gained the necessary two-thirds vote of the United States Senate.

154. *Madzimbamuto v. Lardner-Burke*, 1 A.C. 645 (1969). Lord Reid made the definitive state-

distinguish" the *Madzimbamuto* case.¹⁵⁵

Counsel also relied on the opinion of Justice Dixon in the *Copyright Owners* case in which the Australian Supreme Court found pre-Statute of Westminster Imperial legislation not to be in force in Australia.¹⁵⁶ Counsel contended that the result stemmed from a crystallized convention that Australian independence had outpaced the competence of the United Kingdom Parliament. The seven-man majority noted that the opinion of Justice Dixon was a matter of construction of the British statute in question: "[Such] rules of interpretation . . . would have counted for nothing if the British legislation . . . had been made expressly applicable to Australia."¹⁵⁷

The court also described the recent *Jonathan Cape* case, as the application of legal principle (the restraining of breach of confidence), not a crystallized convention of cabinet practice.¹⁵⁸ The confidence in question arose in an area governed by convention, not law, but the remedy sought was a matter of firm legal (or equitable) principle.

Finally, the court was referred to a series of "authorities," including the recent article by Munro, expressly built on the work of Dicey and his critics.¹⁵⁹ Munro concluded that: "the validity of conventions cannot be the subject of proceedings in a court of law In fact, the idea of a court enforcing a mere convention is so strange that the question hardly arises."¹⁶⁰

The only authority cited who claimed that provincial consent was a crystallized convention was the distinguished Canadian scholar, Professor W.R. Lederman.¹⁶¹ The court attacked his theory by asking, "If there now is such legal rule, what, precisely, does it say? Does Prince Edward Island have an absolute veto, by itself, or does the legal veto reside only with

ment:

It is often said that it would be unconstitutional for the United Kingdom Parliament to do certain things, meaning that the moral, political and other reasons against doing them are so strong that most people would regard it as highly improper if Parliament did these things. But that does not mean that it is beyond the power of Parliament to do such things. If Parliament chose to do any of them, the courts could not hold the Act of Parliament invalid.

Id. at 723.

155. *Dominion Reference*, 125 D.L.R.3d at 23.

156. *Copyright Owners v. E.M.I. (Austl.) Pty. Ltd.*, 100 C.L.R. 597 (1958).

157. *Dominion Reference*, 125 D.L.R.3d at 27.

158. *Attorney-General v. Jonathan Cape Ltd.*, [1976] 1 Q.B. 752.

159. Munro, *Laws and Conventions Distinguished*, 91 L.Q.R. 218 (1975).

160. *Id.* at 228, quoted and discussed in *Dominion Reference*, 125 D.L.R.3d at 28-29.

161. Lederman, *Process of Constitutional Amendment in Canada*, 12 MCGILL L.J. 371 (1967); Lederman, *Constitutional Amendment and Canadian Unity*, in LAW SOCIETY OF UPPER CANADA, SPECIAL LECTURES 1978: THE CONSTITUTION AND THE FUTURE OF CANADA 17 (1978).

‘major’ provinces?” The court found itself unable “to manage” such distinctions.¹⁶²

Finally, the court held that the very nature of the intended resolution rendered it beyond the scope of judicial analysis and legal remedy. As a resolution of the two Houses, as opposed to perfected legislation, it is an internal matter of the Canadian Parliament. A resolution, complete in itself, is not a law-making function. It is, according to May, a declaration as to opinion or purpose.¹⁶³ It is a “proceedin[g] in parliament, . . . not to be impeached or questioned in any court or place out of parliament.”¹⁶⁴ And the Bill of Rights of 1689, Article 9, is undoubtedly part of the law of Canada.¹⁶⁵

A final reason was added in the six-man opinion, which found the existence of a convention: “Perhaps the main reason why conventional rules cannot be enforced by the Courts is that they are generally in conflict with legal rules . . . and the courts are bound to enforce the legal rules.”¹⁶⁶ In other words, conventions usually coexist with a legal power, be it prerogative or otherwise, and control the arbitrary and discretionary use of that legal power.

Having identified the practice of consultation with provinces by reviewing the twenty-one British amendments to the Canadian Constitution, the six-man majority rejected the position of the seven petitioning provinces that the provincial agreement need be unanimous. The court accepted the suggestion of the Attorney-General for Saskatchewan and his constitutional counsel, Dean K. Lysyk of the University of British Columbia Faculty of Law, that the agreement need only be a “sufficient measure.”¹⁶⁷

The court concluded with this enduring declaration: “It should be borne in mind however that, while they are not laws, some conventions may be more important than some laws.”¹⁶⁸

The combined decisions of the Canadian Supreme Court represent a combination of jurisprudential boldness, technical legal accuracy, and political caution. With the collective wisdom of a collegial court, the judgments have struck the right note, in saying, “Mr. Trudeau, you may have the legal power to act unilaterally, but you threaten to overthrow customary political practice.” It could be declared a legal victory for Ottawa, but a moral victory for the provinces, a “Yes, but . . .” decision which happily approximated the inarticulate will of the people of Canada.

162. *Dominion Reference*, 125 D.L.R.3d at 29.

163. E. MAY, *TREATISE ON THE LAW, PRIVILEGES, PROCEEDINGS AND USAGE OF PARLIAMENT* 382 (19th ed. 1976).

164. Bill of Rights, 1689, 1 W. & M., sess. 2, ch. 2, art. 9.

165. British North America Act, 1867, § 18, as substituted by the Parliament of Canada Act, 1875, 38 & 39 Vict., ch. 38, § 1.

166. *Dominion Reference*, 125 D.L.R.3d at 85.

167. *Id.* at 89, 103.

168. *Id.* at 87.

constitutional law, even in a written, or half-written, system cannot run too far ahead of the people nor yet lag too far behind.¹⁶⁹

III. CONCLUSION

After the Canadian Supreme Court decision, Trudeau made further concessions to the provinces which led to near-unanimous agreement of all provincial premiers (save only Lévesque of Quebec)¹⁷⁰ on November 5, 1981 and quick action in the Dominion Parliament.¹⁷¹ The Resolution, in its final form, passed the Canadian House on December 2, 1981, and the Senate on December 8, 1981. The Queen assented to the legislation on March 29, 1982, and royal proclamation activated the Charter of Rights on April 17, 1982.

The words of Lord Atkin may be appropriate: "While the ship of state now sails on larger ventures and into foreign waters she still retains the watertight compartments which are an essential part of her original structure."¹⁷² The Canadian ship of state has now taken on board an internal guidance mechanism and the capacity—without repairing to British dry-dock—to adjust those watertight compartments. The danger that the ship would founder—to be replaced by ten provincial dinghies—has been averted.

169. The balanced attitude of the Court seems likely to persist into the future. The moderate, or swing, block of four justices includes the three youngest men on the Court, and, at the end of 1981, averaged 55 years of age, while the "Trudeau Trio" are, on average, a clear decade older. Finally, the "Provincial Pair" were the two senior members of the panel. An Ontario Appeals Court Judge, Ms. Bertha Wilson, was appointed to the Canadian Supreme Court on March 5, 1982. Justice Wilson, the first woman to sit on that Court, replaced the oldest sitting member, Justice Martland, who was also from Ontario.

170. See *supra* note 14.

171. Had Prime Minister Trudeau proceeded with a unilateral federal proposal, against the wishes of eight provinces (as he often threatened), the Canadian Governor General may have refused to accept the resolution or to transmit the resolution to the Queen. The advice to Her Majesty would then have been offered in most unconventional form.

172. Attorney-General for Canada v. Attorney-General for Ontario, 1937 A.C. 326, 354.